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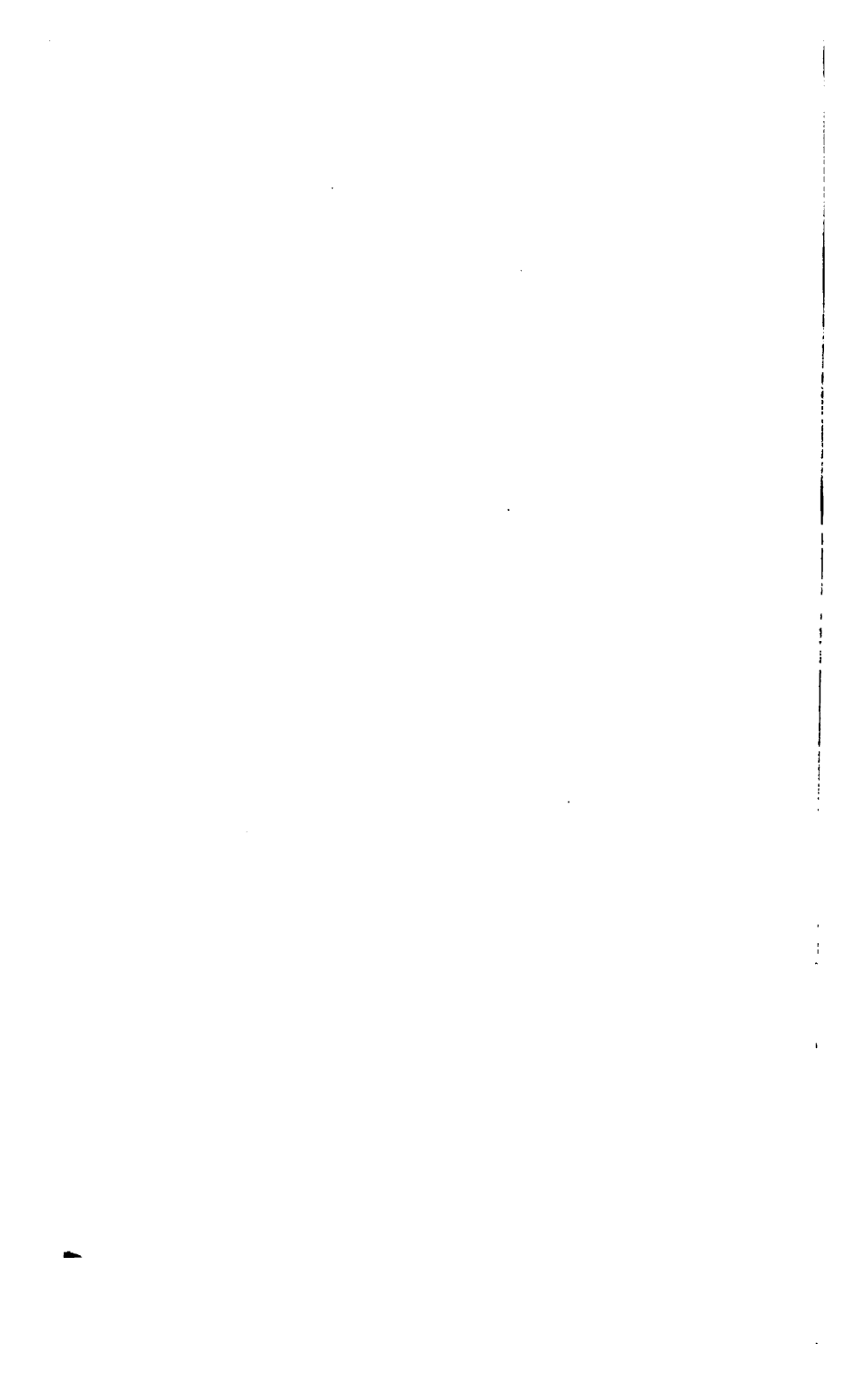
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A SUMMARY
OF THE
LAW OF TORTS;
OR,
WRONGS INDEPENDENT OF CONTRACT.

BY
ARTHUR UNDERHILL, M.A., LL.D.,
OF LINCOLN'S INN, BARRISTER-AT-LAW,
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Trusts and Trustees," "The Settled Land Acts," &c.

FIFTH EDITION.

LONDON:
BUTTERWORTHS, 7, FLEET STREET,
Law Publishers to the Queen's most excellent Majesty.
DUBLIN: HODGES, FIGGIS & CO., GRAFTON STREET.
CALCUTTA: THACKER, SPINK & CO. MELBOURNE: G. ROBERTSON & CO.
MANCHESTER: MEREDITH, RAY & LITTLE.
EDINBURGH: T. & T. CLARK; BELL & BRADFUTE.

1889

LONDON :

PRINTED BY C. F. BOWORTH, GREAT NEW STREET, FETTER LANE—E.C.

TO MY COUSIN,
JOSEPH UNDERHILL, Esq., Q.C.,

Recorder of Newcastle-under-Lyme,

AND

*A Master of the Bench of the Honorable Society
of the Middle Temple,*

This Work

IS,

WITH FEELINGS OF THE HIGHEST RESPECT,

AFFECTIONATELY DEDICATED.



PREFACE

TO

THE FIFTH EDITION.

THE fact that four Editions of this Work have been sold, and that an American firm have thought it worth their while to issue an unauthorized edition in the United States, renders it no longer necessary to apologize for its existence.

Many of my friends and clients have expressed surprise that an Equity and Conveyancing Counsel should have written a treatise on the Law of Torts. The answer is, that every lawyer, whatever his speciality may be, ought to know the *principles* of every branch of the law; and, in my student days, my endeavours to fathom the principles of the Law of Torts were surrounded with so much unnecessary difficulty, owing to the absence of any text-book separating *principle* from *illustration*, that I became convinced that a new crop of students would welcome even such a guide as I was capable of furnishing. The result has proved that I was not mistaken.

Indeed, however useful the great treatises then existing were for the practitioner, they were almost useless to the student. In the first place to his unaccustomed mind they presented a mere chaos of examples, for the most part unexplained, and, in the absence of explanation, seeming very often in direct contradiction. What student without careful explanation would grasp the difference between *Fletcher v. Rylands*, and *Nichols v. Marsland* for instance?

In the second place, the men are few indeed who can trust to their memories to retain the contents of a large treatise with accuracy; and although that is not necessary, yet it is essential that they should accurately remember the *principles* of the law.

For these and other reasons, I ventured to write this work, and I think that if a student will *thoroughly master* it, he will know as much of the *principles* of the Law of Torts as will suffice to make him a competent general practitioner, and to pass him through his examinations so far as that subject is concerned.

I do not assert for one instant that it will enable him to answer every case that comes before him, but I am not acquainted with any man whose mental stock enables him to do this. In the vast majority of cases the practitioner who has any regard for the interests of his clients, or the reputation of himself, will turn to his

digests and his reports; for however well he may understand the principles of the law, it is only very long practice indeed, or the intuition of genius, which enable him to apply these principles to particular complicated facts with ease and certainty.

This Edition has been entirely re-arranged, and in great measure re-written; and the sub-rules which appeared in past editions have been incorporated in the main rules. It is hoped that this plan will be found to add to the lucidity of the Work. I have also inserted some American and Colonial decisions, which seemed to me to be both good law and excellent illustrations of principles.

ARTHUR UNDERHILL.

8, OLD SQUARE, LINCOLN'S INN, W.C.
April, 1889.



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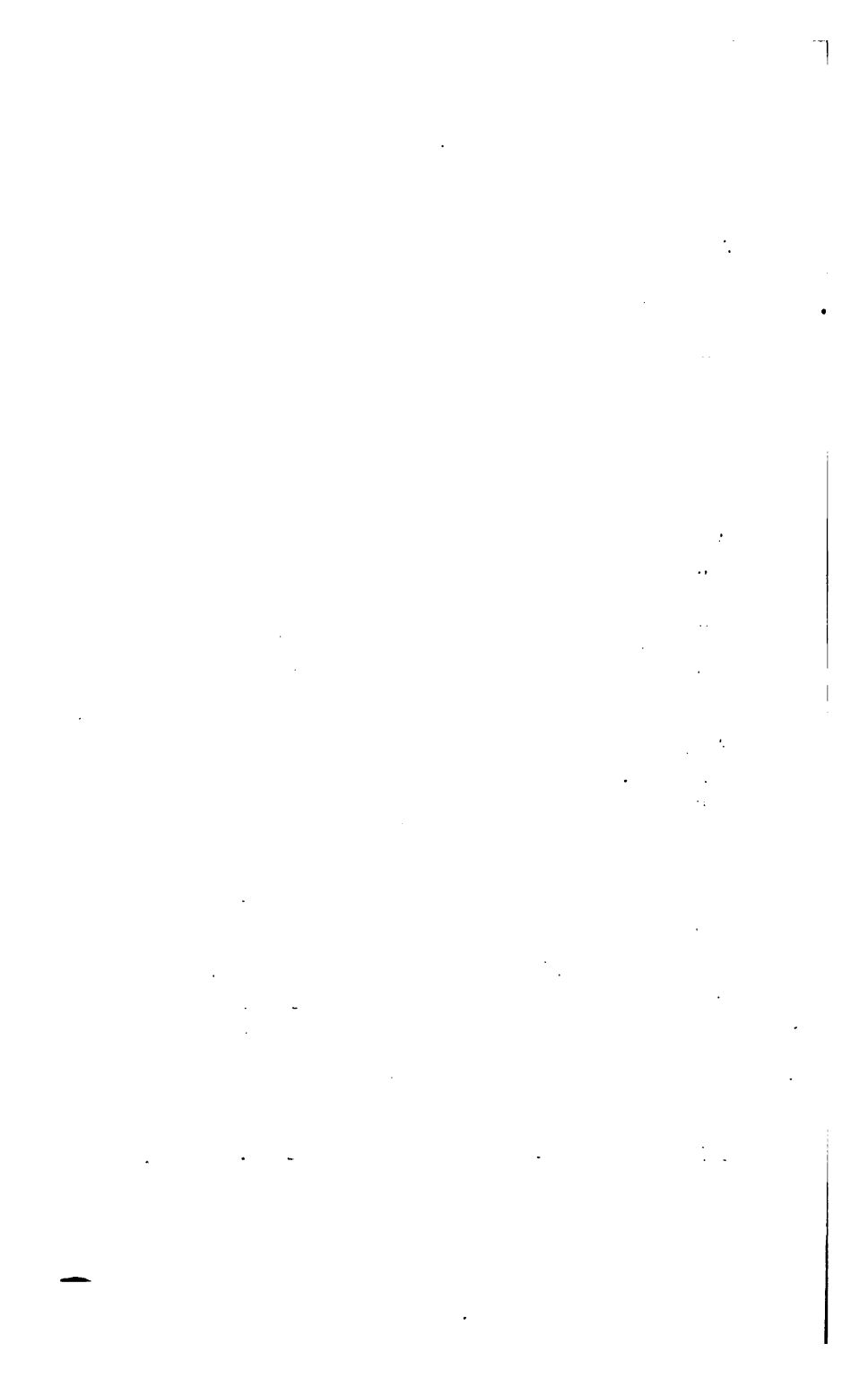


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INTRODUCTION.

INTRODUCTION.

“THE maxims of law,” says Justinian, “are these : To live honestly, to hurt no man, and to give every one his due.” The practical object of law must necessarily be to enforce the observance of these maxims, which is done by punishing the dishonest, causing wrongdoers to make reparation, and ensuring to every member of the community the full enjoyment of his rights and possessions.

Infractions of law are, for the purposes of justice, divided into two great classes: viz., public and private injuries. The former—commonly called crimes—consist of such offences as, aiming at the root of society and order, are considered to be injuries to the community at large; and as no redress can be given to the community, except by the prevention of such acts for the future, they are visited with some deterrent and exemplary punishment.

Private or civil injuries, on the other hand, are such violations or deprivations of the legal rights of another, as are accompanied by either actual or presumptive damage. These, being merely injuries to private individuals, admit of redress. The law, therefore, affords a remedy by forcing the wrongdoer to make reparation.

But as injuries are divided into criminal and civil, so the latter are subdivided into two classes, of injuries *ex contractu* and injuries *ex delicto*—the former being such as arise out of the violation of duties undertaken by contract, and the latter (commonly called torts) such as spring from the violation of duties imposed by law, to the performance or observance of which every member of the community is entitled as against the world at large.

Although, however, these divisions are broadly correct, the border line between them is by no means well defined. Indeed, from the very nature of things, each division must to some extent overlap another one. Thus the same set of circumstances may constitute a crime, a tort, and a breach of contract. At the same time, as those circumstances may be regarded from each of the three points of view, no confusion ensues from the fact that they cannot be exclusively located in any one of the three classes.

In this work an attempt will be made to state the principles which the law applies to those facts which constitute torts.

PART I.

RULES RELATING TO TORTS IN GENERAL.

CHAPTER I.

OF THE NATURE OF A TORT.

ART. 1.—*Definition of a Tort.*

A TORT is an act or omission which, independent of contract, is unauthorized by law, and results either in the infringement of some absolute right to which another is entitled, or in the infliction upon him of some substantial loss of money, health, or material comfort beyond that suffered by the rest of the public, and remediable by an action for damages.

No one has yet succeeded in formulating a perfectly satisfactory definition of a Tort; indeed, it may be doubted whether a scientific definition which would at the same time convey any notion to the mind of the student is possible.

A tort is described in the Common Law Procedure Act, 1852, as “a wrong independent of contract.” If we use the word “wrong,” as equivalent to violation of a right recognized and enforced by law by means of an action for damages, the definition is sufficiently accurate, but scarcely very lucid; for it

gives no clue as to what constitutes a wrong or violation of a right recognized and enforced by law.

A recently published text book (a), by a distinguished American Lawyer, defines a tort as a breach of duty fixed by law, and redressable by a suit for damages; but this definition does not seem to convey much information to the reader, and confessedly requires an elaborate explanatory dissertation.

Perhaps Professor Pollock, in his work on torts (b), gives the most complete definition; but I cannot help thinking that, excellent as it is, the student is more likely to grasp the legal meaning of the word "tort" from the brief definition which I have attempted.

It will be perceived from this, that three distinct factors are necessary to constitute a tort according to our law. First, there must be some act or omission on the part of the person committing the tort (the defendant), unauthorized by law, and not being a breach of some duty undertaken by contract. Secondly, this wrongful act or omission must, in some way, inflict an injury, special, private, and peculiar to the plaintiff, as distinguished from an injury to the public at large; and this may be either by the violation of some right *in rem*, that is to say, some right to which the plaintiff is entitled as against the world at large, or by the infliction on him of some particular and substantial loss of money, health, or material comfort. Thirdly, the wrongful

(a) Bigelow's Elements of the Law of Torts.

(b) See Pollock on Torts, p. 19.

act injurious to the plaintiff must fall within some class of cases for which the recognized legal remedy is an action for damages.

It is desirable that the effect of the absence of any one of these three factors should be examined a little more closely.

One often sees it stated in legal works that a *damnum absque injuriâ* is not actionable, but that an *injuria sine damno* is. This jingle has probably puzzled many generations of students, but it comes to very little when dissected.

By *damnum* is meant damage in the *substantial* sense of money, loss of comfort, service, health, or the like. By *injuria* is meant an unauthorized interference, however trivial, with some general right conferred by law on the plaintiff (*ex. gr.* the right of excluding others from a private road). All that the maxims come to, therefore, is this, that no action lies for mere damage (*damnum*), however substantial, caused without breach of law, but that an action does lie for interference with another's legal private rights, even where unaccompanied with damage. *Injuria*, therefore, in the maxim is not equivalent to breach of law, but to that limited kind of breach of law which consists in the violation of another's private rights.

Read by the light of these observations, both the maxims in question are correct. For the interruption of a legal right, however temporary and however slight, is considered by the law to be damaging, and a proper subject for reparation; and substantial damages have more than once (in cases of false imprisonment) been awarded, where the plaintiff's

surroundings were very considerably improved during his unlawful detention. But when no private right (*ex. gr.* liberty) has been invaded by a wrongful act, then no action will lie unless the plaintiff has sustained actual loss or damage.

The reason for all this is very clear. In the case of the invasion of a private right, there is a particular damage inflicted on the plaintiff, and that by means of a wrongful act, and therefore the defendant ought to make reparation. But where no private right is infringed, and no particular damage inflicted, but merely an act or omission not authorized by law is committed or made, there the grievance, if grievance it be, is one properly affecting the public and not any private individual in particular; and if every member of the public were allowed to bring actions in respect of it, there would be no limit to the number of actions which might be brought (*Winterbottom v. Lord Derby, L. R., 2 Ex. 316*). The remedy of the public is by indictment if the unlawful act amounts to so serious a dereliction of duty as to constitute an injury to the public. But if, in addition to the injury to the public, a special, peculiar, and substantial damage is occasioned to an individual, then it is only just that he should have some private redress (see *Lyon v. Fishmongers' Co., 1 App. Cas. 662*; and *Fritz v. Hobson, 14 Ch. D. 542*).

It will, therefore, be seen that there must be an unauthorized act or omission causing either an infringement of some general right, or inflicting some substantial private damage. But in addition to this, the injury must fall within some class recognized

by law, and for which an action for damages is the appropriate remedy. For instance, murder is an act unauthorized by law, and it may inflict most cruel and particular damage on the family of the murdered man; but, nevertheless, that gives them no civil remedy against the murderer. So, if one libels a dead man, his children have no right to redress, although it may cause them to be cut off from all decent society. So a breach of trust, although certainly an act unauthorized by law, and usually followed by private and particular loss to the beneficiaries, does not fall within the class of civil injuries remediable by an action for damages, and therefore cannot properly be said to constitute a tort. It would appear that since the abolition of the action of *crim. con.* the same remarks apply to adultery, and consequently that subject is omitted from the present edition of this work.

Having now explained the nature of the elements which are essential to the constitution of a tort, the attention of the student is invited to a few illustrations.

(1) If one trespass upon another's land without lawful excuse, that is an interference with an absolute legal right (*viz.*, the right of exclusive possession of a man's own land). Moreover, being without excuse, it is an act not authorized by law, and consequently the two elements of an unauthorized act and the consequent infringement of a legal right are present, and an action for tort may be maintained. But if the trespass were committed in self-defence, in order to escape some pressing danger, then no

action would lie; for the law authorizes the commission of a trespass for that purpose. Consequently, although in such a case there is an invasion of the right of exclusive possession, the other element of a tort—viz., an act not authorized by law—is absent, and therefore no tort is committed.

(2) Again, if I own a shop which greatly depends for its custom upon its attractive appearance, and a company erect a gasometer hiding it from the public, I cannot sue them; because, although my trade may be ruined by the obstruction, yet the gas company are only doing an act authorized by law, namely, building upon their own land (*Butt v. Imperial Gas Co.*, L. R., 2 Ch. App. 158). Although, therefore, the element of substantial damage is present, the element of an unauthorized act is not; it is a case of *damnum absque injuriâ*, and no tort is committed. (See also *Street v. Union Bank, &c.*, 33 W. R. 901.)

(3) A legally qualified voter duly tenders his vote to the returning officer, who wrongly refuses to register it. The candidate for whom the vote was tendered gains the seat, and no loss whatever, either in money, comfort, or health, is suffered by the rejected voter; yet his absolute right to vote at the election is infringed, and that by an unauthorized act of the returning officer, and hence we have the two elements sufficient to support an action of tort (*Ashby v. White*, 1 Sm. L. C. 251). This is an instance of *injuria sine damno*.

(4) A man erects an obstruction in a public way. The plaintiff is delayed on several occasions in passing along it, being obliged, in common with every

one else who attempts to use the road, either to pursue his journey by a less direct route, or else to remove the obstruction. He can, nevertheless, not maintain an action, because, although the element of an unauthorized or unlawful act on the part of the defendant is present, yet there is no invasion of an absolute private right, and no substantial damage peculiar to the plaintiff beyond that suffered by the rest of the public (*Winterbottom v. Lord Derby*, L. R., 2 Ex. 316).

(5) The defendant leaves an unfenced hole upon premises adjoining a highway. The plaintiff, in passing along the highway at night, falls into the hole, and is injured. Here both elements of a tort are present; for the law does not authorize the leaving of an unfenced hole adjacent to a highway, and likely to be a danger to persons lawfully using it, and the plaintiff clearly suffers a special and substantial damage beyond that suffered by the rest of the public, and accordingly he can recover damages (*Hadley v. Taylor*, L. R., 1 C. P. 53).

(6) The plaintiff kept a coffee-house in a narrow street. The defendants were auctioneers, carrying on an extensive business in the same neighbourhood, having an outlet at the rear of their premises next adjoining the plaintiff's house, where they were constantly loading and unloading goods into and from their vans. The vans intercepted the light from the plaintiff's coffee-house to such an extent that he was obliged to burn gas nearly all day, and access to his shop was obstructed, and the smell from the horses' manure made the house uncomfortable.

Here there was an unauthorized state of facts constituting a public nuisance, but there was also a direct and substantial private and particular damage to the plaintiff, beyond that suffered by the rest of the public, so as to entitle him to maintain an action (*Benjamin v. Storr*, L. R., 9 C. P. 400).

(7) A person is guilty of negligence, or violence, whereby the plaintiff's servant is injured, and incapacitated from performing his usual duties. Here the loss of service is a substantial deprivation of comfort sufficient to give the plaintiff a right of action (*Berringer v. G. E. R. Co.*, 4 C. P. D. 163). There is, however, a curious exception to this, viz., that where the servant is *killed on the spot*, no action lies by the master (*Osborn v. Gillett*, L. R., 8 Ex. 88).

ART. 2.—*Classification of unauthorized Acts or Omissions constituting one element of a Tort.*

Acts unauthorized by law, and which, when coupled with the invasion of a right or the infliction of substantial damage, constitute a tort, may be conveniently divided into the following classes, viz.:—

- (a) Malicious acts, or acts so reckless as to imply malice;
- (b) Negligent acts or omissions;
- (c) Acts or omissions in relation to the user of property or otherwise not depending on malice or negligence;

(d) Acts without legal justification directly infringing another's private rights.

In the words of Pratt, C. J., "torts are infinitely various, for there is not anything in nature that may not be converted into an instrument of mischief" (see *Chapman v. Pickersgill*, 2 Wils. 146). It is, therefore, hopeless to attempt any definition of what constitutes an unauthorized act or omission, upon which an action for tort may be founded; but, broadly speaking, the above classification may, perhaps, give the student some standard by which to measure particular cases.

Class (a) covers cases of defamation, malicious prosecution and arrest, maintenance, seduction, and fraud.

Class (b) comprises all cases arising out of the breach of the duty of care.

Class (c) includes all cases coming under the maxim *sic utere tuo ut alienum non lædas: ex gr. nuisances*.

Class (d) requires some explanation, because it is the one class where, at first sight, the unauthorized act and the consequent injury appear to be inseparable. And no doubt the same *act* does often constitute both elements of a tort, as, for instance, where one beats another, the act of beating is *primâ facie* both an unauthorized act and an invasion of a right. It is not, however, necessarily so, for suppose the beating is administered by the order of a court having jurisdiction to inflict "the cat," there the beating is not an unauthorized act, although it is an interference

with the general right of the subject to immunity from battery. Consequently, although the same act may, and often does, of itself combine both elements of a tort, it is divisible for the purposes of legal analysis into the two elements which must exist if the act is actionable. In all such cases we must ask ourselves the questions: (1) Is the act one which is unauthorized? and (2) Is it an act which if unauthorized violates a legal right? This class embraces all those unauthorized violations of the rights of person and property conferred by law on every member of the community, including assault and battery, false imprisonment, trespass on and dispossession of lands, trespass to and conversion of personal property, infringement of patents and trade marks, and the like.

Generally, the classification above attempted makes no pretence to scientific accuracy. Some of the classes may, and doubtless do, overlap one another. All that is attempted is to give the student a rough idea of the various kinds of unauthorized acts or omissions, which may constitute the first element of a tort, and in the absence of which no amount of loss or damage will suffice to give a right of action.

ART. 3.—*Of Volition and Intention in relation to the unauthorized Act or Omission.*

(1) The unauthorized act or omission must be attributable to active or passive volition

on the part of the party to be charged, otherwise it will not constitute an element of a tort.

(2) Nevertheless a want of knowledge of its illegality and appreciation of its probable consequences affords no excuse, except in cases in which malice or fraud are of the essence of the unauthorized act or omission. For every person is presumed to intend the probable consequence of any voluntary act or omission of his.

(3) Where an act or omission is done or made under the influence of pressing danger, and was *necessary* in order to escape that danger, there is a presumption that it was done or made involuntarily.

The student must carefully distinguish between the voluntary nature of the act or omission and the want of knowledge or appreciation of the fact that it was in fact an act or omission not authorized by law. It would be obviously unjust to charge a man with damage caused by some inevitable accident, over which, or over the causes of which, he had no control. On the other hand it would be highly dangerous to admit the doctrine, that a man who does an act, or makes an omission voluntarily, should be excused the consequences because of lack of judgment or by reason of ignorance.

The following illustrations will, however, help to

accentuate the difference better than pages of explanation:—

(1) A butcher owns a horse which has always stood quietly at the customers' doors while the butcher applied for orders. On one occasion, being frightened by a passing steam roller, the horse runs away, and knocks down and severely injures the plaintiff. Here the butcher is liable; for he voluntarily left the horse in a public highway unattended. That was the unauthorized omission from which the damage to the plaintiff arose. No doubt the butcher never intended to hurt the plaintiff, nor did he voluntarily cause the horse to run away; but having once voluntarily omitted to take a precaution which the law required of him, the fact that he did not foresee, and from past experience had no reason to apprehend, the result, affords no excuse.

(2) A person has an unguarded shaft or pit on his premises. If another, lawfully coming on to the premises on business, falls down the shaft, and is injured, he may bring his action, although there was no intention to cause him or anyone else any hurt. For the neglect to fence the shaft was an unauthorized omission, and the fall of the plaintiff was a probable consequence of it (*Indermaur v. Dames*, L. R., 2 C. P. 311; *White v. France*, 2 C. P. D. 308).

(3) The defendants, a burial board, planted on their own land, and about four feet distant from their boundary railings, a yew tree, which grew through and beyond the railings, so as to project over an adjoining meadow which was hired by the

plaintiff for pasture. The plaintiff's horse, feeding in the meadow, ate of that portion of the tree which projected, and died of the poison contained therein. The tree was planted and grown with the knowledge of the defendants:—*Held*, that the defendants were liable (*Crowhurst v. Amersham Burial Board*, 4 *Ex. D.* 5; and see *Laz v. Corp. of Darlington*, 5 *Ex. D.* 28).

(4) On the other hand, where an ordinarily quiet horse was being driven along a highroad by the defendant, and suddenly bolted and injured the plaintiff's horse, it was held that the defendant was not liable, because the injury to the plaintiff's horse was not attributable to any voluntary unauthorized act or omission of his (*Wakeman v. Robinson*, 1 *Bing.* 213; *Manzoni v. Douglas*, 6 *Q. B. D.* 145; and *Tillett v. Ward*, 10 *Q. B. D.* 17).

(5) Under the Metropolis Local Management Act (18 & 19 Vict. c. 120), a duty is imposed upon the vestry, of properly cleansing the sewers vested in them. Under the premises of the plaintiff was an old drain, which was one of the sewers vested in the vestry. This drain having become choked, the soil therefrom flowed into the cellars of the plaintiff and did damage. In an action against the vestry, the jury found (*inter alia*) that the obstruction was unknown to the defendants, and could not by the exercise of reasonable care have been known to them. Held, that upon this finding the defendants were entitled to the verdict (*Hammond v. Vestry of St. Pancras, L. R.*, 9 *C. P.* 316, and see also *Losee v.*

Buchanan, 51 *New York Rep.* 476, in relation to the liability of the owner of a steam boiler).

(6) It is a rule of law, that where one brings on to his property for his own purposes, and collects and keeps there, any substance likely to do injury to his neighbour if it escapes, he must keep it at his peril. Yet where the escape could not have been prevented by any possible means, he will not be liable, as will be seen from the well-known case of *Nichols v. Marsland* (*L. R.*, 10 *Ex.* 255, and on appeal, 2 *Ex. D.* 1). The facts there were as follows:—On the defendant's land were artificial pools containing large quantities of water. These pools had been formed by damming up, with artificial embankments, a natural stream which rose above the defendant's land, and flowed through it, and which was allowed to escape from the pools by successive weirs into its original course. An *extraordinary* rainfall caused the stream and the water in the pools to swell, so that the artificial embankment was carried away by the pressure, and the water in the pools, being suddenly loosed, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff having brought an action against the defendant for damages, the jury found that there was no negligence in the construction or maintenance of the works, and that the rainfall was most excessive, and amounted to a *vis major* or visitation of God. Under these circumstances, it was held that no action was maintainable, because, as Bramwell, B., said, "the defendant had done nothing wrong; he had infringed no right. It was not the defendant who let loose the water and

sent it to destroy the bridges. He did, indeed, store it, and stored it in such quantities that if it were let loose it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier would be liable; but that cannot be. Then why is the defendant liable, if some agent over which he has no control lets the water out? The defendant merely brought the water to a place, whence another agent let it loose, *but the act is that of an agent he cannot control*" (see also *Nitro-Phosphate Co. v. London and St. Katharine's Dock Co.*, 9 Ch. D. 503).

(7) And so again where the reservoir of the defendant was caused to overflow by a third party sending a great quantity of water down the drain which supplied it, and damage was done to the plaintiff, it was held that the defendant was not liable; Kelly, C. B., saying:—"It seems to me to be immaterial whether this is called a *vis major* or the unlawful act of a stranger; it is sufficient to say that the defendant had no means of preventing the occurrence" (*Box v. Jubb*, 4 Ex. D. 77).

(8) The above cases must be carefully distinguished from the well-known leading case of *Rylands v. Fletcher* (L. R., 3 H. L. 330), the facts of which were as follows:—The plaintiff was the lessee of mines. The defendant was the owner of a mill, standing on land adjoining that under which the mines were worked. The defendant desired to construct a reservoir, and *employed competent persons to*

construct it, so that there was no question of negligence. The plaintiff had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts, communicating with the land above, which had also been out of use for years, and were apparently filled with marl and earth of the surrounding land. Shortly after the water had been introduced into the reservoir, it broke through some of the vertical shafts, flowed thence through the old passages, and finally flooded the plaintiff's mine. It was contended on behalf of the defendant that there was no negligence on his part, and that if he were held liable, it would make every man responsible for every mischief he occasioned, however involuntarily, or even unconsciously, whereas he contended that knowledge of possible mischief was of the very essence of the liability incurred by occasioning it. The House of Lords, however, held the defendant to be liable on the ground that "a person who, for his own purposes, brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is *prima facie* responsible for all the damage which is the natural consequence of its escape." It therefore appears that the act which was not authorized by law was *the allowing the water to escape*, and whether this was the result of negligence, or whether it was the *result of a latent and undiscovered defect in the engineering works*, was quite immaterial. The escape of the water was caused by something of which the defendant was *ignorant*, not

by something altogether beyond his control or volition, like a visitation of Providence or the act of a third party. As Mellish, L. J., said in *Nichols v. Marsland* (2 *Ex. D.* 5), "if indeed the damages were caused by the act of the party *without more*—as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes, and does damage to his neighbour—the case of *Rylands v. Fletcher* establishes that he must be held liable." But where there is *something more*—either the act of God or of a third party—which is the proximate cause of the damage, then *Rylands v. Fletcher* has no application. This of course, however, presupposes that the damage has been *solely* caused by the act of God or of a third party, and that the defendant has not contributed to it by *some distinct breach of duty* (as in *The Nitro-Phosphate Co. v. London and St. Katharine's Dock Co.* cited above) (*Harris v. Mobbs*, 3 *Ex. D.* 268; *Clark v. Chambers*, 3 *Q. B. D.* 327).

The distinction between *Rylands v. Fletcher* on the one hand, and *Nichols v. Marsland* and *Box v. Jubb* on the other, is no doubt subtle and difficult for the lay mind to grasp; but it shortly comes to this, that a man is not liable for the acts of God or a third party, unless (1) he has committed some distinct breach of duty, or (2) where he has taken upon himself to construct a dangerous work, and such work is in fact defective, whether owing to the constructor's negligence or not; for having taken upon himself to make it, he must be taken to guarantee that it is fit for the purpose for which it is made (see also *Hard-*

man v. N. E. R. Co., 3 C. P. D. 168; and *Fletcher v. Smith*, 2 App. Cas. 781).

(9) A person wrongfully threw a squib on to a stall, the keeper of which, in self-defence, threw it off again; it then alighted on another stall, was again thrown away, and, finally exploding, blinded the plaintiff. The liability of the persons who threw it away from their stalls in self-defence was not the question before the court, but a dictum of Chief Justice De Grey is a good illustration of the rule. He said, "It has been urged, that the intervention of a free agent will make a difference; but I do not consider Willis and Ryal (the persons who merely threw away the squib from their respective stalls) as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation" (*Scott v. Shepherd*, 2 W. Bl. 894). The first illustration to Art. 1 (*supra*) is another example of the rule that a person acting under the influence of pressing danger is not a voluntary agent.

ART. 4.—*Of the connection of the Damage with the unauthorized Act or Omission.*

There will be no tort where the loss or damage is such as would not usually be found to follow from the unauthorized act or omission, unless it can be shown that the defendant knew, or had reasonable means of

knowing, that consequences not usually resulting from such an act or omission were, by reason of some existing cause, likely to intervene so as to cause such damage.

(1) The defendant, in breach of the Police Act (2 & 3 Vict. c. 47, s. 54), washed a van in a public street, and allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed by ice, and the water flowed over a portion of the causeway, which was ill-paved and uneven, and there froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse, while being led past the spot, slipped upon the ice and broke its leg. In giving judgment in an action brought in respect of this damage, Chief Justice Bovill said: "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom;" but "where there is no reason to expect it, and no knowledge in the person doing the wrongful act, that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrongdoer liable to an action. If the drain had not been stopped, and the road had been in a proper state of repair, the water would have passed away without doing any mischief to anyone. Can it then be said to have been the ordinary and

probable consequence of the defendant's act that the water should have frozen over so large a portion of the street so as to occasion a dangerous nuisance? I think not. There was no distinct evidence to show the cause of the stoppage of the sink or drain, or that the defendant knew it was stopped. He had a right, then, to expect that the water would flow down the gutter to the sewer in the ordinary course, and, but for the stoppage (for which the defendant is not responsible), no damage would have been done." And accordingly judgment was given in favour of the defendant (*Sharp v. Powell, L. R., 7 C. P. 258*).

(2) But where water, which had trickled down from a waste-pipe at a railway station on to the platform, had become frozen, and the plaintiff, a passenger, stepped upon it and fell and was injured, the court held the defendants liable, on the ground, probably, that the non-removal of a *dangerous nuisance*, like ice, from their premises, was the proximate cause of the injury (*Shepherd v. Mid. R. Co., cited by plaintiff arguendo; Sharp v. Powell, supra*).

ART. 5.—*Where Damage would have been suffered in the absence of unauthorized Act or Omission.*

Where the elements of a tort are present, the fact that similar damages would have been suffered by the plaintiff, even if the wrongful act or omission had not been done or made by the defendant, does not excuse the latter.

It is, however, open to him to show, if he can, that there is a substantial *and ascertainable* portion of the damages fairly to be attributed *solely* to the other circumstances, and in that case he is entitled to a proper deduction in that respect (see *Nitro-Phosphate Co. v. London and St. Katharine's Dock Co.*, 9 Ch. D. 503).

Thus where it was the duty of the defendants to keep a river wall at a height of four feet two inches above Trinity high water mark, and they only kept it at a height of four feet, and an extraordinary tide rose four feet five inches, and flooded the plaintiffs' works; it was held, that as the defendants had committed a breach of duty in not building their wall to the proper height, and some damage having been suffered in consequence thereof, an action lay against them, although even if the wall had been of the required height, the tide would still have overflowed it. James, L. J., said:—"Suppose that the same damage would have been done by the excess of height of the tide if the wall had been of due height as has been done; yet if the damage has been done by reason of the wall not being of due height, the defendants are liable for that damage arising from that cause, and are not excused because they would not have been liable for similar damage if it had been the result solely of some other cause; and moreover, long before the tide rose even to four feet, it began to flow over towards and into the plaintiffs' works,

and of course the defendants cannot escape their liability for the damage so occasioned, because the tide afterwards went on swelling and swelling, even if it could be shown that the same damage would have been occasioned by that additional height of water if the wall of the defendants had been in proper condition. They had been guilty of neglect, and had done damage before the extra height had been reached, and their liability to the plaintiffs was complete when the damage was done. . . . No doubt if the court can see on the whole evidence [as they could not see in that case] that there was a substantial and ascertainable portion of the damage, fairly to be attributed *solely to the excess of the tide above the proper height which it was the duty of the defendants to maintain*, occurring after the excess had occurred, and which would have happened if the defendants had done their duty, then there ought to be a proper deduction in that respect" (*Nitro-Phosphate Co. v. London and St. Katharine's Dock Co.*, 9 Ch. D. 526; and see also *Clark v. Chambers*, 3 Q. B. D. 327, and *Harris v. Mobbs*, 3 Ex. D. 268).

ART. 6.—*To what Extent Civil Remedy interfered with where the unauthorized Act or Omission constitutes a Felony.*

(1) Where any unauthorized act or omission is, or gives rise to consequences which make it, a felony, and it also violates a

private right, or causes private and peculiar damage to an individual, the latter has a good cause of action.

(2) But (*semble*) the policy of the law will not allow the person injured to seek civil redress, if he has failed in his duty of bringing, or endeavouring to bring, the felon to justice.

(3) Where the offender has been brought to justice at the instance of some third person injured by a similar offence, or where prosecution is impossible by reason of the death of the offender, or (?) by reason of his escape from the jurisdiction before a prosecution could by reasonable diligence have been commenced, the right of action is not suspended (per Baggallay, L. J., *Ex parte Ball, re Shepherd*, 10 Ch. D. 673; and see per Cockburn, C. J., *Wells v. Abrahams*, L. R., 7 Q. B. 557).

But although this would seem to be the rule, it is extremely doubtful how it can be enforced. It is certainly no ground for the judge at the trial to direct a nonsuit (*Wells v. Abrahams, sup.*). It cannot be raised by demurrer (*Roope v. D'Avigdor*, 10 Q. B. D. 412); nor by plea, because the effect of that would be to allow a party to set up his own criminality. But it has been suggested, that if an

action were brought against a person who was either in the course of being prosecuted for felony, or was liable to be prosecuted for felony, the summary jurisdiction of the court might be invoked, to stay the proceedings which would involve an undue use, probably an abuse, of the process of the court (per Cockburn, C. J., *Wells v. Abrahams*, *sup.*). And in the same case, Blackburn, J., said, "I do not see how a plaintiff can be prevented from trying his action, unless the court, acting under its summary jurisdiction, interfere." . . . "From the time these cases were decided, there is no reported instance of the court having interfered to stop an action until we come to *Gimson v. Woodful*, 2 C. & P. 41. That case went to this extent, that where a horse had been stolen by A., and B. afterwards had the horse, the owner could not afterwards bring an action to recover it from B., unless he had prosecuted A. But in *White v. Spettigue* (13 M. & W. 603) that was expressly overruled. The last case is *Wellock v. Constantine*, 32 L. J., C. P. 285." . . . "That case, I think, cannot be treated as an authority;" . . . "to say that because it was for the interest of the public, the action should be stayed until the indictment was tried, and for this purpose to nonsuit the plaintiff, or to direct the jury to find a verdict for the defendant upon issues not proved, seems to me to be erroneous."

In *Ex parte Ball, re Shepherd* (10 Ch. D. 667), Bramwell, L. J., said: "There is the judgment in *Ex parte Elliott* (3 Mont. & A. 110), besides the

expressed opinion for centuries, that the felonious origin of a debt is in some way an impediment to its enforcement. But in what way? I can think of only four possible ways:—1. That no cause of action arises at all out of a felony. 2. That it does not arise till prosecution. 3. That it arises on the act, but is suspended till prosecution. 4. That there is neither defence to, nor suspension of the claim by, or at the instance of the felon, but that the court of its own motion, or on the suggestion of the crown, should stay proceedings till public justice is satisfied. It must be admitted that there are great difficulties in the way of each of these theories. That the first is not true is shown by *Marsh v. Keating* (1 Bing. N. C. 198), where it was held, that prosecution being impossible, a felony gave rise to a recoverable debt. It is difficult to suppose that the second supposed solution of the problem is correct. That would be to make the cause of action the act of the felon plus a prosecution. The cause of action would not arise till after both. Till then, the statute of limitations would not run. In such a case as the present, or where the felon had died, it would be impossible. And it is to be observed that it is never suggested that the cause of action is the debt *and* the prosecution. The third possible way is attended by difficulties. The suspension of a cause of action is a thing nearly unknown to the law. It exists where a negotiable instrument is given for a debt, and in cases of compositions with creditors, and these were not held till after much doubt and contest. There may be other instances. And what is to happen? Is the statute of limitations to run? Suppose the debtor

or his representative sue the creditor, is his set-off suspended? Then how is the defence of impediment to be set up? By plea? That would be contrary to the rule, *nemo allegans suam turpitudinem est audiendus*. Besides it would be absurd to suppose that the debtor himself ever would so plead, and face the consequences. Then is the fourth solution right? Nobody ever heard of such a thing; nobody in any case or book ever suggested it till Mr. Justice Blackburn did as a possibility. Is it left to the court to find it out on the pleadings? If it appears on the trial, is the judge to discharge the jury? How is the crown to know of it? There are difficulties, then, in all the possible ways in which one can suppose this impediment to be set up to the prosecution of an action. But, again, suppose it can be, what is the result? It has been held, that when the felon is executed for another felony the claim may be maintained. What is to happen when he dies a natural death, when he goes beyond the jurisdiction, when there is a prosecution, and an acquittal from collusion or carelessness by some prosecutor other than the party injured? All these cases create great difficulties to my mind in the application of this alleged law, and go a long way to justify Mr. Justice Blackburn's doubt. Still after the continued expression of opinion and the cases of *Ex parte Elliott* and *Wellock v. Constantine*, I should hesitate to say that there is no practical law as alleged by the respondent." Unfortunately the point was not necessary for the decision in *Ex parte Ball*, and consequently the law still remains in a very hazy and unsatisfactory state, with regard to which it is im-

possible to express any opinion with confidence. However, the rule, as above expressed, has received the sanction of nearly three centuries; and although the criticisms of Lord Justice Bramwell throw some doubt upon its accuracy, it must, I think, be taken to be law until it is expressly overruled.

CHAPTER II.

VARIATION IN THE GENERAL PRINCIPLE WHERE
THE UNAUTHORIZED ACT OR OMISSION IS ONE
FORBIDDEN BY STATUTE.

ART. 7.—*General Rule.*

(1.) When a statute gives a *right*, or creates a *duty*, in favour of an individual or class, then, if no penalty is attached, any infringement of the right or breach of the duty will be a tort remediable in the ordinary way (*Dormont v. Furness R. Co.*, 11 Q. B. D. 496).

(2.) But where a penalty is attached (whether recoverable by the party aggrieved or not), it then becomes a question whether the legislature intended that the penalty should be the only satisfaction, or whether, in addition, the party injured should be entitled to sue for damages.

(3.) In the case of a private act imposing an active duty, the penalty will *primâ facie* be taken to be the only remedy given for

breach of the duty (*Atkinson v. Newcastle Water Co.*, 2 *Ex. D.* (C. A.) 444).

(1) By acts of parliament the harbour of B. was vested in the defendants, and its limits were defined. The defendants had however jurisdiction over the harbour of P. and the channel of P. beyond those limits, for the purpose of, *inter alia*, buoying "the said harbour and channel." A moiety of the net light duties to which ships entering or leaving the harbour of P. contributed, was to be paid to the defendants and to be applied by them in, *inter alia*, buoying and lighting the harbour and channel of P. A vessel was wrecked in the channel of P., which under the Wrecks Removal Act, 1877 (40 & 41 Vict. c. 16), s. 4, the defendants had power to, and did partially, remove. The wreck not removed was not buoyed, and the plaintiff's vessel was in consequence wrecked:—*Held*, that the statutes imposed upon the defendants an obligation to remove the wreck from the channel, or to mark its position by buoys, and that not having done so they were liable in damages to the plaintiff (*Dormont v. Furness Railway Co.*, 11 *Q. B. D.* 496).

(2) At one time it was generally considered that, when a statute gave a right or created a duty in favour of an individual or class, then, unless it enforced the duty by a penalty recoverable *by the party aggrieved* (as distinguished from a common informer), any infringement of such right, or breach of such duty, would, if coupled with actual damage, be a tort remediable in the ordinary way. This

notion was founded upon the judgment in the case of *Couch v. Steel* (3 E. & B. 402), but is no longer a correct statement of the law. Thus, water companies are by act of parliament obliged to keep their pipes, to which fire plugs are attached, constantly charged with water at a certain pressure, and are to allow all persons, at all times, to use the same for extinguishing fire without compensation; and for neglect of this duty a penalty is imposed, recoverable by a common informer. On a demurrer to a declaration by which the plaintiff claimed damages against a water company for not keeping their pipes charged as required, whereby his premises were burnt down, it was held by the Court of Appeal that the action would not lie, Lord Cairns, L. C., saying:—"Apart from authority, I should say without hesitation that it was no part of the scheme of this act to create any duty which was to become the subject of an action at the suit of individuals, to create any right in individuals with a power of enforcing that right by action, but that its scheme was, having laid down certain duties, to provide guarantees for the due fulfilment of them, and where convenient to give the penalties, or some of them, to the persons injured, but, where not convenient so to do, then simply to impose public penalties, not by way of compensation but as a security for the due performance of the duty. To split up the 43rd section, and to say *that in those cases in which a penalty is to go into the pocket of the individual injured there is to be no right of action, but that where no penalty is so given to the individual there is to be a right of action, is to violate the ordinary rules*

of construction." His lordship then referred to *Couch v. Steel*, and continued, "I must venture, with great respect to the learned judges who decided that case, and particularly to Lord Campbell, to express grave doubts whether the authorities cited by Lord Campbell justify the broad general proposition that appears to have been there laid down, that wherever a statutory duty is created, any person, who can show that he has sustained injuries from the non-performance of that duty, can bring an action for damages against the person on whom the duty is imposed. I cannot but think that *that must to a great extent depend on the purview of the legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the act with which the court has to deal is not an act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers, as to the manner in which they will keep up certain public works.*" (*Atkinson v. Newcastle Water Co.*, 2 Ex. D. 441; and see also *Colley v. L. & N. W. Ry. Co.*, 5 Ex. D. 277; and *Vallance v. Falle*, 13 Q. B. D. 109.)

(3) On the other hand, where, by 4 & 5 Vict. c. 45, s. 17, a penalty is imposed upon unauthorized persons unlawfully importing books, reprinted abroad, upon which copyright subsists, the remedy by action is not taken away from the authors; for there is a right created in their favour, and the penalty is cumulative (*Novello v. Sudlow*, 12 C. B. 188; and for other instances of the enforcement of statutory rights or duties by action, see *Ross v. Rugge Price*, 1 Ex. D.

269, and *Geddis v. Proprietors of Bann Reservoir*, 3 App. Cas. 430).

ART. 8.—*Where the Act or Omission is forbidden to prevent a particular Mischief.*

Where a duty is created by a statute for the purpose of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action for damages in respect of such loss (*Gorris v. Scott*, L. R., 9 Ex. 125).

(1) Thus, in the above case, the defendant, a shipowner, undertook to carry the plaintiff's sheep from a foreign port to England. On the voyage, some of the sheep were washed overboard, by reason of the defendant's neglect to take a precaution enjoined by an order of the Privy Council, which was made under the authority of the Contagious Diseases (Animals) Act, 1869. It was, however, held, that the object of the statute and order being to prevent the spread of contagious disease among animals, and not to protect them against the perils of the sea, the plaintiff could not recover.

(2) And so, where certain regulations were established by statute for the management of the pilchard fishery, and enforced by the imposition of penalties, it was held, that a fisherman who had lost his proper

turn and station, according to the regulations, through the breach of them by another fisherman, could not maintain an action for damages against him for the loss of a valuable capture of fish, which the latter had taken, through being in such wrong place. For the object of the statute was to regulate the fishery, and not to give any individual fisherman a right to any particular place (*Stevens v. Peacocks*, 11 Q. B. 741).

ART. 9.—*The Observance of Statutory Precautions does not restrict Common Law Liability.*

Unless a statute expressly or by necessary implication restricts common law rights, such rights remain unaffected.

Thus, the defendant was possessed of a steam traction-engine, and whilst it was being driven by the defendant's servants along a highway, some sparks escaping from it set fire to a stack of hay of the plaintiff's standing on a neighbouring farm. The engine was constructed in conformity with the Locomotive Acts, 1861 and 1865, and there was no negligence in the management of it. It was nevertheless held that the defendant was liable, on the ground that the engine being a dangerous machine (and, therefore, within the doctrine of *Fletcher v. Rylands*) an action would have been maintainable at common law, and that the Locomotive Acts did not restrict the common law liability (*Powell v. Fall*, 5 Q. B. D. 597.)

CHAPTER III.

VARIATIONS IN THE GENERAL PRINCIPLE WHERE
THE UNAUTHORIZED ACT OR OMISSION ARISES
OUT OF THE PERFORMANCE OF A CONTRACT.ART. 10.—*Cases where Tort and Contract overlap.*

WHENEVER there is a contract, and something to be done in the course of the employment, which is the subject of that contract, if there be a breach of duty in the course of that employment, the plaintiff may recover either in tort or in contract (*Brown v. Boorman*, 11 *Cl. & F.* 44).

Although a tort has been defined as a wrong independent of contract, there is nevertheless a class of injuries which lie on the borderland, as it were, between contract and tort, and for which an action *ex contractu*, or *ex delicto*, may generally be brought at the pleasure of the party injured.

(1) **Negligence of professional men.**—Thus, if an apothecary carelessly or unskilfully administer improper medicines to a patient, whereby such patient is injured, he may sue him either for the breach of his implied contract to use reasonable skill and care,

or for tortious negligence, followed by the actual damage (*Searl v. Prentice*, 8 *East*, 847).

(2) The plaintiff, who held a mortgage for 4,600*l.* upon lands belonging to one F., agreed to make him a further advance of 400*l.* upon having an additional piece of land, which F. had subsequently acquired, added to the former security. The defendant, who acted as the plaintiff's solicitor in the matter, omitted to ascertain (as the fact was) that a third person had an equitable charge to the extent of 46*l.* upon this additional piece of land, in consequence of which the plaintiff, upon the sale of the property, was unable to convey without paying this 46*l.*:—Held, that this was negligence for which the solicitor was liable (*Whiteman v. Hawkins*, 4 *C. P. D.* 13).

(3) **Waste.**—So where a person, having an estate for life or years, commits waste, it is both a breach of the implied contract to deliver up the premises in as good a condition as when he entered upon them, and also an injury to the reversion, which is a violation of the reversioner's right, and therefore a tort.

(4) **Negligence of owners of market.**—The defendants were owners of a cattle market, and in the market-place they had erected a statue, round which they had placed a railing. The plaintiffs attended the market with their cattle and occupied a site for which they paid toll. A cow, belonging to them, in attempting to jump the railing, injured herself, and subsequently died from those injuries. The jury found that the rail was dangerous:—Held, that the defendants having *received toll from the plaintiffs*, and invited them to come into the market

with their cattle, a duty was imposed upon them to keep the market in a safe condition, and therefore an action would lie against the defendants for the loss sustained by the plaintiffs (*Lax v. Corp. of Darlington*, 5 *Ex. D.* 28; and see *Hyman v. Nye*, 6 *Q. B. D.* 685.)

ART. 11.—*Privity necessary where the Tort arises out of the Performance of a Contract.*

Whenever a wrong arises out of the performance of a contract within the meaning of Art. 10, the following principles apply:—

(a) No one, not a privity to the contract, can sue *the person who has contracted*, in respect of such wrong (*Tollit v. Shenstone*, 5 *M. & W.* 289; *Winterbottom v. Wright*, 10 *M. & W.* 109).

(b) But where there is a distinct tort to the plaintiff altogether separate and apart from the breach of contract, although connected with it, the plaintiff may sue although not privity to the contract.

(c) *A fortiori* if, in addition to the particular breach of duty committed by the contracting party to the contractee, the same circumstances constitute a tort by a third party to a third party, the third party so injured may sue the third party so injur-

ing him (*Berringer v. S. E. R. Co.*, 4 C. P. D. 163).

Illustrations of paragraph (a).—(1) Thus a master cannot sue a railway company for loss of services, caused by his servant being injured by the company's negligence when being carried by them; for the injury in such a case arises out of the contract between the company and the servant, to which the master is no party (*Alton v. Mid. R. Co.*, 34 L. J., C. P. 292).

(2) And so it has been held by the American courts, that where a steam boiler is defectively and negligently constructed by a manufacturer, and sold by him to a purchaser, and subsequently explodes and injures a third party, the manufacturer is only liable to the purchaser and not to the third party (*Losee v. Clute*, 51 *New York Rep.* 474, and *National, &c. v. Ward*, 100 *U. S. Rep.* 195; and see also *Longmeid v. Holliday*, 6 *Ex.* 761; and *Hearen v. Pender*, 9 *Q. B. D.* 302).

Illustrations of paragraph (b).—(3) On the other hand, it has been held by the American courts, that a dealer in drugs who carelessly labels a deadly poison as a harmless medicine, and sends it so labelled into the market, is liable to *all* persons, whether purchasers or not, who, without fault on their part, are injured by using it as medicine. The liability of the dealer, however, arises in that case not out of any contract, but out of the duty which the law imposes upon him to avoid *acts* in their *very*

nature dangerous to the lives of others (*Thomas v. Winchester*, 6 *New York Rep.* 397). At first sight this seems difficult to reconcile with the case of the defective boiler, but it is apprehended that the distinction consists in this, that the direct and obvious consequence of labelling poison as medicine is to inflict damage, whereas the fact that a person is killed by the bursting of a steam boiler is only a remote consequence of its defective construction. In short, it is not a *wrongful act* in itself to construct a steam boiler defectively, but it is a wrongful act to label poison as medicine.

(4) So in *cases of fraud* (as is hereafter mentioned) a man is responsible for the consequences of a breach of a warranty made by him to another, upon the faith of which a third person acts; provided that such false representation was made with the direct intent that it should be acted upon by such third person (*Barry v. Crossbey*, 2 *Johns. & H.* 21).

(5) And so where a father bought a gun for the use of himself *and his son*, and the defendant sold it to him *for that purpose*, fraudulently representing it as sound, and it exploded and injured the son; it was held that he could maintain an action of tort, although not privy to the warranty (*Langridge v. Levy*, 4 *M. & W.* 338).

(6) So where the defendant sold to A. a hair-wash, *to be used by A.'s wife*, and professed that it was harmless, but in reality it was very deleterious, and injured A.'s wife, it was held that she had a good cause of action against the defendant (*George v. Skivington*, *L. R.* 5 *Ex.* 1). This decision has been

dissented from by Field and Cave, JJ., in *Heaven v. Pender* (9 Q. B. D. 302), but their decision was reversed on appeal (11 Q. B. D. 503).

(7) So if a surgeon treat a child unskilfully, he will be liable to the child, even though the parent contracted with the surgeon (*Pippin v. Sheppard*, 11 Price, 400).

(8) So "a stage-coach proprietor who may have contracted with a master to carry his servant, if he is guilty of neglect, and the servant sustain personal injury, is liable to him; for it is a *misfeasance towards him if, after taking him as a passenger*, the proprietor drives without due care, and, as will be seen from the next rule, a misfeasance is a distinct tort" (*Longmeid v. Holliday*, 6 Ex. 767, per Parke, B.).

(9) And so, on the same ground, where a servant travelling with his master, who took his ticket and paid for it, lost his portmanteau through the railway company's negligence, he was held entitled to sue the company (*Marshall v. York, &c. R. Co.*, 21 L. J., C. P. 34).

Illustrations of paragraph (c).—(10) Where, on the other hand, a servant took a ticket of the London and Tilbury Railway Company, who thereby impliedly contracted to carry him with care and without negligence, and the servant travelled in a train drawn by an engine of the South Eastern Railway Company, and the latter company also provided the signalman and so on, and owing to their negligence a collision happened, and the servant was injured, it was held that the master could sue

the South Eastern Railway Company. For although he could not sue the London and Tilbury Company, because, *quod* them, the wrong was one arising out of contract in respect of which the servant alone could sue, yet the negligence of the South Eastern Railway Company did not arise out of any contract. They were entire strangers to the contract, and their tort was a tort pure and simple, and consequently the master could sue in respect of it (*Berringer v. S. E. R. Co.*, 4 C. P. D. 163).

ART. 12.—*Duties gratuitously undertaken.*

The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in its performance (*Coggs v. Bernard*, 1 Sm. L. Ca. 177, 6th ed.).

Misfeasance.—There is a class of contracts which are particularly nearly allied to torts. Such are gratuitously undertaken duties. Such duties are not contracts in one sense, namely, that, being without consideration, the contractor is not liable for their nonfeasance, *i.e.*, for omitting to perform them. But, on the other hand, if he once commences to perform them, the contract then becomes choate as it were, by virtue of the above rule—

(1) Thus, in the above case, the defendant

gratuitously promised the plaintiff to remove several hogsheads of brandy from one cellar to another, and, in doing so, one of the casks got staved through his gross negligence. Upon these facts it was decided that the defendant was liable; for although his contract could not have been enforced against him, yet, having once entered upon the performance of it, he thence became liable for all misfeasance.

(2) Again, the defendants, the Metropolitan District Railway Company, have running powers over the South Western Railway between Hammersmith and the New Richmond Station of the South Western Company. Above the booking-office at the Richmond station are the words "South Western and Metropolitan Booking Office and District Railway." The plaintiff took from the clerk there employed by the South Western Company a return ticket to Hammersmith and back. The ticket was not headed with the name of either Company, but bore on it the words "via District Railway." On his return journey from Hammersmith the plaintiff travelled with this ticket in a train belonging to the defendants and under the management of their servants. The carriage being unsuited for the New Richmond Station platform, the plaintiff, in alighting, fell and was hurt. He brought an action against the defendants, and the jury found negligence in them:—Held, that having invited or permitted the plaintiff to travel in their train, the defendants were bound to make reasonable provision for his safety; and that there was evidence of their liability, *even assuming the ticket not to have been issued by or for them, but for*

the South Western Company (Foulkes v. Met. Dis. R. Co., 5 C. P. D. 157).

(3) So persons performing a public duty gratuitously are responsible for an injury to an individual through the negligence of workmen employed by them (*Clothier v. Webster*, 12 C. B. N. S. 790; *Mersey v. Gibbs*, L. R. 1 H. L. 93; *Foreman v. Mayor*, L. R. 6 Q. B. 217).

Bailments.—In some works injuries to goods whilst in the keeping of carriers and innkeepers are described as torts; in others as breaches of contract; but however actions in respect of them may be framed, they are in substance *ex contractu*, being for non-performance of the contract of bailment, and not for a tort independent of contract (*Roscoe*, 539; 2 Bl. Com. 451; *Legge v. Tucker*, 26 L. J. Ex. 71). I shall therefore not treat of them in this work.

CHAPTER IV.

OF PERSONAL DISABILITY TO SUE AND TO BE SUED FOR TORT.

ART. 13.—*Who may sue.*

(1) Every person may maintain an action for tort, except an alien enemy and a convict during his incarceration (33 & 34 Vict. c. 23, sects. 8, 30).

(2) A wife cannot sue a husband for tort, nor a husband his wife (*a*).

ART. 14.—*Who may be sued for a pure Tort.*

(1) Every person who commits a tort not depending on fraud or malice, and not arising out of the performance of a contract, is liable to be sued, notwithstanding infancy, coverture, or unsoundness of mind, except

(*a*) The proceedings allowed to be commenced by a wife against her husband under the 12th section of the Married Women's Property Act, 1882, could scarcely comprise an action for tort.

(1) the sovereign, (2) foreign sovereigns, and (3) ambassadors of foreign powers (see *Magdalena Co. v. Martin*, 28 L. J. Q. B. 310).

(2) Every person who commits a tort depending on fraud or malice is liable to be sued, unless from extreme youth or unsoundness of mind he is mentally incapable of contriving fraud or malice (*semble*).

(1) Thus where an infant is guilty of negligence, and thereby causes loss to another, the latter may sue him for damages, notwithstanding his infancy (*Burnard v. Haggis*, 14 C. B. N. S. 45).

(2) So, also, infants and married women are clearly liable for fraud (see *Re Lush*, L. R. 4 Ch. App. 591, and *Sharpe v. Foy*, *ibid.* 35); but as fraud depends, not upon acts or omissions simply, but upon acts done or omissions made with *intent to injure another*, it would seem to follow that extreme youth or lunacy of such a character as would negative the existence of such intention would probably be held a good defence (see per Lord Esher, M. R., *Emmens v. Pottle*, 16 Q. B. D. at p. 356). The same principle would of course apply to torts which depend on the existence of malice.

ART. 15.—*Who may be sued for Torts founded on Contract.*

No person can be sued for a tort arising out of the performance of a contract, who

would be incapable of entering into that contract.

(1) Thus, where an infant hired a horse and over-worked it, so that it was permanently injured, it was held that he was not liable, because the tort was one arising out of the performance of the contract of hiring (*Jennings v. Rundall*, 8 T. R. 335).

(2) Of course, however, where the tort is merely connected with, and does not arise out of, the performance of the contract, the case is difficult; *ex. gr.*, if the infant in the last preceding illustration had shot the horse, or sold it, he would clearly have been liable (see *Burnand v. Haggis*, 14 C. B. N. S. 45). There is, however, sometimes very considerable difficulty in saying whether a tort arises out of the performance of, or is merely connected with, a contract.

CHAPTER V.

LIABILITY FOR TORTS COMMITTED BY OTHERS.



PART I.

LIABILITY OF HUSBAND FOR TORTS OF WIFE.

ART. 16. *Wife's ante-nuptial and post-nuptial Torts.*

(1) Although a married woman may now be sued alone in respect of her ante-nuptial torts, her husband is also liable to the extent of the property which he received with her; and he may be sued either jointly with her or alone (45 & 46 Vict. c. 75, ss. 13, 14, and 15).

(2) Although a married woman may now be sued alone in respect of her post-nuptial torts (45 & 46 Vict. c. 75, s. 1), her husband is nevertheless also liable, and may be joined with her as defendant (*Seroka v. Kattenburg*, 17 Q. B. D. 177).

Prior to the Married Women's Property Act, 1882, a wife could not be sued alone for a tort. Her torts

were torts of her husband, and indeed Jessel, M. R., said in one case (*Wainford v. Heyl*, L. R. 20 Eq. 321), that, strictly speaking, a married woman could not commit torts, but could merely create a liability against her husband. By the above-mentioned act, however, this exemption is removed, and a married woman is now as liable to be sued alone for her torts as if she were a *feme sole*. This enactment, however, does not affect the common law liability of a husband for his wife's torts (*Seroka v. Kattenburg*, *ubi sup.*); and, consequently, a plaintiff can elect whether he will sue the wife alone, or join her husband as co-defendant with her.



PART II.

LIABILITY OF EMPLOYER FOR TORTS OF
CONTRACTOR.ART. 17. *General Immunity.*

A person employing a contractor will be liable for the contractor's wrongful acts in the following cases only:—

(1) If the employer retains his control over the contractor, and personally interferes and makes himself a party to the act which occasions the damage.

(2) If the thing contracted to be done is itself illegal.

(3) If a legal duty is incumbent on the employer, and the contractor either omits, or imperfectly performs such duty.

(4) Where the thing contracted to be done, although lawful in itself, is likely, in the ordinary course of events, to damage another's property unless preventive means are adopted, and the contractor omits to adopt such means (*Hughes v. Percival*, 8 App. Cas. 443).

(1) A contractor, employed by navigation commissioners, in the course of executing the works flooded the plaintiff's land, by improperly, and without authority, introducing water into a drain insufficiently made by himself. Here the contractor, and not the commissioners, was held liable (*Allen v. Howard*, 7 Q. B. 960; and see also *Jones v. Corp. of Liverpool*, 14 Q. B. D. 890).

(2) So where a company contracted with A. to construct a railway, and A. sub-contracted with B. to construct a bridge on it, and B. employed C. to erect a scaffold under a special contract between him and C.; a passenger injured by the negligent construction of the scaffold could only sue C., and not A., B., or the company (*Knight v. Gex*, 5 Ex. 721; and see *Kiddle v. Lovett*, 16 Q. B. D. 605).

(3) So where a butcher bought a bullock, and hired a licensed drover to drive it to his shop; and the drover, instead of so doing, employed a boy for the purpose; it was held that the butcher was not

liable for the injurious consequences caused by the boy's negligence, as the relation of master and servant did not exist between them (*Milligan v. Wedge*, 12 A. & E. 737).

(4) So if the owner of a carriage hire horses from a job master, who at the same time provides a driver, the job master is liable for accidents caused by the driver's negligence; for he is his servant, and not that of the owner of the carriage (*Quarman v. Burnett*, 6 M. & W. 499). And *quid* the public, a similar principle applies to cab proprietors and cab drivers where the proprietor finds both cab and horse (*Venables v. Smith*, 2 Q. B. D. 279); but it is otherwise where the driver finds the horse and harness, or merely hires the cab (*King v. Spurr*, 8 Q. B. D. 104).

(5) **Illustrations of exceptions.**—But, where the defendant employed a contractor to make a drain, and he left some of the soil in the highway, in consequence of which an accident happened to the plaintiff, and afterwards the defendant, on complaint being made, promised to remove the rubbish, and paid for carting part of it away, *and it did not appear that the contractor had undertaken to remove it*; it was held that the defendant was liable under exception (1) (*Burgess v. Gray*, 1 C. B. 578).

(6) A company, not authorized to interfere with the streets of Sheffield, directed their contractor to open trenches therein; the contractor's servants in doing so left a heap of stones, over which the plaintiff fell and was injured. Here the defendant company was held liable, as the interference with the streets

was in itself a wrongful act (*Ellis v. Sheffield Gas Consumers' Co.*, 23 L. J. Q. B. 42).

(7) So where the defendants were authorized by an act of parliament to construct an opening bridge over a navigable river, a duty was cast upon them to construct it properly and efficiently; and the plaintiff having suffered loss through a defect in the construction and working of the bridge, it was held that the defendants were liable, and could not excuse themselves by throwing the blame on their contractor (see *Hole v. Sittingbourne, &c.*, 6 H. & N. 488).

(8) Plaintiff and defendant were owners of two adjoining houses, plaintiff being entitled to have his house supported by defendant's soil. Defendant employed a contractor to pull down his house, excavate the foundations and rebuild the house. The contractor undertook the risk of supporting the plaintiff's house as far as might be necessary during the work, and to make good any damage and satisfy any claims arising therefrom. Plaintiff's house was injured in the progress of the work, owing to the means taken by the contractor to support it being insufficient. Held, on the principle above laid down (paragraph 4), that the defendant was liable (*Bower v. Peate*, 1 Q. B. D. 321; and see to same effect, *Tarry v. Ashton*, *ib.* 314, and *Angus v. Dalton*, 6 App. Cas. 740).

PART III.

LIABILITY OF MASTER FOR TORTS OF SERVANT.

SECT. 1.—LIABILITY TO THIRD PARTIES.

ART. 18.—*General Principle.*

(1) A person who puts a servant in his place to do a class of acts in his absence, is answerable for the torts of the servant, either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; and whether it be done negligently, wantonly, or even wilfully. Provided that what is done, is done by the servant in the course and within the general scope of his employment (*Bayley v. Manchester, Sheff. & Lincoln. R. Co., L. R., 7 C. P. 415*).

(2) But if the servant, without regard to his service or his duty therein, or solely to accomplish some purpose of his own, acts maliciously or wantonly, the master is not liable (*Mott v. Consumers' Ice Co., 73 New York Reps. 543*).

(3) For the purposes of this rule a person is considered a servant, whether he is hired by the master personally, or by those who

are intrusted by the master with the hiring of servants, to do the business required of him (*Laugher v. Pointer*, 5 B. & C. 547).

Who are servants.—This rule springs from the well-known legal maxim, "*qui facit per alium facit per se.*"

(1) To illustrate the last paragraph of the rule, first, the word "servant" applies not only to domestic servants, but to clerks, managers, agents, and, in short, all whom the master appoints to do any work, and over whom he retains any control or right of control, even though they be not under his immediate superintendence. Thus, "if a man is owner of a ship, he himself appoints the sailing master, and desires him to appoint and select the crew. The crew thus become appointed by the owner, and are his servants for the management of his ship: and if any damage happen through their default, it is the same as if it happened through the immediate default of the owner himself" (*Laugher v. Pointer*, *sup.*, per Littledale, J.)

(2) **General illustrations of the rule.**—Thus, if a servant drive his master's carriage over a bystander; or if a gamekeeper employed to kill game fire at a hare and kill a bystander; or if a workman employed in building, negligently drop a stone from the scaffold, and so hurt a bystander; the person injured may claim reparation from the master; because the master is bound to guarantee the public against all damage arising from the wrongful or careless acts of himself, or of his servants when

acting within the scope of their employment (*Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Ca. 266).

(3) **The tort must be committed in the course of the employment.**—It will be perceived that the liability of the master depends on two points, viz., (1) the tort must have been committed in the course of the employment, and (2) the act or omission must have been within the general scope of that employment. If either of these factors is absent, the master is freed from liability. Thus, in *Rayner v. Mitchell* (2 C. P. D. 357) it was the duty of the carman of the defendant, who was a brewer, to deliver beer to the customers with the defendant's horse and cart, and on his return collect empty casks, for each of which he received a penny. The carman having, without the defendant's permission, taken out the horse and cart *for a purpose entirely of his own*, on his way back collected some empty casks, and while thus returning the plaintiff's cab was injured by the carman's negligent driving. Under these circumstances, it was held that the defendant was not liable; and Lindley, J., said, "The question is, whether, under these circumstances, the servant was acting in the course of his employment. In my judgment he was not. It is certain that the servant did not go out in the course of the employment. Does it alter the case, that whilst coming back he picks up the casks of a customer? I think it does not. He was returning on a purpose of his own, and he did not convert his own private occupation into the employment of his master, simply by picking up the casks of a customer."

(4) So, where a master intrusted his servant with his carriage for a given purpose, and the servant drove it for another purpose of his own in a different direction, and in doing so drove over the plaintiff, the master was held not to be responsible, on the ground that the servant was not acting within the scope of his employment (*Storey v. Ashton*, *L. R.*, 4 *Q. B.* 476). But if the servant when going on his master's business had merely taken a somewhat longer road, such a deviation would not have been considered as taking him out of his master's employment (*Mitchell v. Crassweller*, 22 *L. J.*, *C. P.* 100; and see *Whiteley v. Pepper*, 2 *Q. B. D.* 276).

(5) Thus, in *Rourke v. White Moss Coal Co.* (2 *C. P. D.* 205), the defendants had contracted with W. to sink a shaft for them at so much a yard, W. to provide all necessary labour, the defendants providing steam power and machinery, and two engineers, *to be under the control of W.* The plaintiff, one of W.'s workmen, was injured by the negligence of L., one of the defendant's engineers; but it was held that the company were not liable for this injury, on the ground, that although L. was their general servant, yet at the time of the injury he was not actually employed in doing their work, and was under the immediate control of W., to whom he had been lent by them, and whose servant, therefore, he must be considered to have been. (See also *Hodkinson v. L. & N. W. R. Co.*, 32 *W. R.* 662.)

(5) Tort must be within the general scope of employment.—The plaintiffs occupied offices beneath those of the defendant's. In the defendant's office

was a lavatory for his own use exclusively, and the use of which was expressly forbidden to his clerks. One of the latter, nevertheless, used it, and left the water running, whereby the plaintiff's offices were flooded. Held, that the act of the clerk was not within the scope of his authority, and that the defendant was not liable (*Stevens v. Woodward*, 6 Q. B. D. 313; and see, as to fraud of an agent, *Newlands v. Nat. Employers' Acc. Ass. Co.*, 54 L. J., Q. B. 428; *British Mutual Bkg. Co. v. Charnwood, &c. Co.*, 18 Q. B. D. 714; and *Burnett v. S. L. Trams. ib.* 815).

(7) On the other hand, in *Limpus v. London General Omnibus Co.* (11 W. R. 149; 7 L. T., N. S. 245), the driver of an omnibus wilfully, and contrary to express orders from his master, pulled across the road, in order to obstruct the progress of the plaintiffs' omnibus. In an action of negligence, it was held, that if the act of driving across to obstruct the plaintiffs' omnibus, although a reckless driving, was nevertheless an act done in the course of the driver's service, and to do that which he thought best for the interest of his master, the master was responsible. And Willes, J., said, "Of course, one may say that it is no part of the duty of a servant to obstruct another omnibus; and in this case the servant had distinct orders not to obstruct the other omnibus. I beg to say that in my opinion those instructions were perfectly immaterial. If they were disregarded, the law casts upon the master the liability for the acts of his servants in the course of his employment; and the law is not so futile as to allow the master, by giving secret instructions to his servant, to set aside his own liability. . . . The proper

question for the jury to determine is, whether what was done was in the course of the employment, and for the benefit of the master." Blackburn, J., also, quoting and approving the charge of the learned judge who tried the case, said, "If the jury came to the conclusion that he did it, not to further his master's interest, not in the course of his employment as an omnibus driver, but from private spite, with an object to injure his enemy—who may be supposed to be the rival omnibus—that would be out of the course of his employment. That saves all possible objections."

(8) The case of *Poulton v. London and South Western R. Co.* (*L. R.*, 2 *Q. B.* 534) seems, at first sight, to be inconsistent with the above case. There, a station-master having demanded payment for the carriage of a horse conveyed by the defendants, arrested the plaintiff, and detained him in custody until it was ascertained by telegraph that all was right. The railway company had no power whatever to arrest a person for non-payment of carriage, and therefore the station-master, in arresting the plaintiff, did an act that was wholly illegal, not in the mode of doing it, but in the doing of it at all. Under these circumstances, the court held that the railway company were not responsible for the act of their station-master; and Blackburn, J., said: "In *Limpus v. General Omnibus Co.*, the act done by the driver was within the scope of his authority, though no doubt it was a wrongful and improper act, and, therefore, his masters were responsible for it. In the present case, an act was done by the station-master completely out of the scope of his authority, which

there can be no possible ground for supposing the railway company authorized him to do, and a thing which could never be right on the part of the company to do. Having no power themselves, they cannot give the station-master any power to do the act." And Mellor, J., said: "If the station-master had made a mistake in committing an act which he was authorized to do, I think in that case the company would be liable, because it would be supposed to be done by their authority. Where the station-master acts in a manner in which the company themselves would not be authorized to act, and under a mistake or misapprehension of what the law is, then I think the rule is very different, and I think that is the distinction on which the whole matter turns" (but see *Moore v. Metropolitan R. Co.*, *L. R.*, 8 *Q. B.* 36).

(9) In *Goff v. Great Northern R. Co.* (3 *E. & E.* 672), on the other hand, the act was the arresting a man for the benefit of the company where there was authority to arrest a passenger for non-payment of his fare; and the court accordingly held, that the policemen who were employed, and the station-master, must be assumed to be authorized to take people into custody whom they believed to be committing the act, and that if there was a mistake, it was a mistake within the scope of their authority.

(10) So, again, in *Bayley v. Manchester, Sheffield and Lincoln. R. Co.* (*L. R.*, 7 *C. P.* 415), the plaintiff, a passenger on the defendants' line, sustained injuries in consequence of being pulled violently out of a railway carriage by one of the defendants' porters;

who acted under the erroneous impression that the plaintiff was in the wrong carriage. The defendants' bye-laws did not expressly authorize the company's servants to remove any person being in a wrong carriage, or travelling therein without having first paid his fare and taken a ticket, and they even contain certain provisions which implied that the passengers should be treated with consideration; but, nevertheless, the court considered that it was within the probable scope of a porter's authority gently to remove any person in a wrong carriage, and as the porter had exercised his probable authority violently, they held that the company was responsible (see also *Seymour v. Greenwood*, 6 H. & N. 359.)

(11) So where a bye-law of a railway company forbade any persons, except employees, to ride on baggage cars; and enjoined the officials to strictly enforce the rule; and one of the officials, while the train was in motion, ordered a passenger to get off one of the baggage cars; and upon his failure to comply, *kicked him off*, whereby he fell under the wheels, and was greatly injured; it was held by the New York Court that the company was liable, on the ground that "it is not necessary to show that the master expressly authorized the particular act. It is sufficient to show that the servant was engaged at the time in doing his master's business, and was acting within the general scope of his authority; and this, although he departed from the private instructions of the master, abused his authority, was reckless in the performance of his duty, and inflicted

unnecessary injury" (*Rounds v. Delaware, &c. Railroad*, 64 *New York Rep.* 129).

ART. 19.—*Ratification of Tort committed by a Servant.*

A tortious act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, and, whether it be for his detriment or his advantage, to the same extent as if the same act had been done by his previous authority (*Wilson v. Tumman*, 6 *M. & Gr.* 242).

This rule is generally expressed by the maxim, "*Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*," and is equally applicable to torts and to contracts. It should be observed that the act *must* have been done for the use or for the benefit of the principal (4 *Inst.* 317; *Wilson v. Barker*, 4 *B. & Ad.* 614; and judgment, Dallas, C.J., *Hull v. Pickersgill*, 1 *B. & B.* 286).

ART. 20.—*Unauthorized Delegation by Servant.*

A master is not, in general, liable for the tortious acts of persons to whom his servant has, without authority, delegated his duties,

and between whom and the master the relation of master and servant does not exist (*submitted*, and see *Jewell v. Grand Trunk Railway*, 55 N. H. 84).

(1) Thus it is apprehended that if a master wrote to his groom and ordered him to take the carriage to such a place, and the groom, instead of taking the carriage himself, employed A. to do it for him without having ever had any authority from the master to intrust A. with the carriage, and A. so carelessly drove the carriage as to injure B., no action would lie against the master. For the master never hired the groom for the purpose of employing others to do his work; and therefore, in intrusting the carriage to A., he would be acting beyond the scope of his employment, and beyond his probable authority.

(2) But if, on the other hand, the groom had taken A. with him, and had handed the reins to him, it is submitted that the master would be liable, because the handing of the reins to another whilst he was in the act of performing his duty would be a default in the performance of that duty, and not a complete retirement from its performance (see per Lord Abinger, *Boothe v. Mister*, 7 C. & P. 66, and *Joel v. Morrison*, 6 C. & P. 503).

Such is a brief outline of the law relating to the responsibility of masters to third parties for the torts of their servants; but the learning on the subject is of so technical a character, and the distinctions as to

when a servant is, and when not, acting within the scope of his employment, or even whether he be a servant at all, are so very refined, and the authorities are so conflicting, that a legal training is often necessary in order that the difference may be distinguished. I shall therefore content myself with the foregoing general rules (which are believed to be accurate so far as they go), leaving to other and larger works on the law of master and servant the task of quoting the numerous cases on the subject, and commenting upon the very subtle distinctions between them.

SECTION 2.

LIABILITY TO SERVANTS FOR INJURIES CAUSED BY FELLOW-SERVANTS.

Prior to the 1st of January, 1881, the liability of a master to his servant for an injury resulting from the negligence of his fellow-servant differed very materially from his liability to a third party for a similar injury. On that day, however, the Employers' Liability Act (43 & 44 Vict. c. 42) came into operation, and, with regard to certain classes of servants, makes a considerable alteration in the common law. The act is, however, merely tentative, being passed for a period of seven years only (since extended until the end of 1889), and a master and servant may, by mutual arrangement, contract themselves out of its provisions. Consequently (1) even with regard to the class of servants who fall within

the provisions of the statute, the common law rules still apply in cases where the master and servant contract themselves out of the act; (2) unless the act is renewed at the end of 1889, the common law rules will be again universally applicable (*a*); and (3) there are still a large class of servants (domestic and menial and other servants) who do not come within the meaning of the act at all. For these reasons it is necessary that the student should first consider the common law liability of a master towards his servant, and then he may with advantage examine how far those rules are modified by the statute in question.

SUB-SECTION 1.—COMMON LAW LIABILITY.

ART. 21.—*General Immunity.*

(1) A master is not liable to his servant for damage resulting from the negligence or unskilfulness of his fellow-servant in the course of their common employment, unless:—

(a) The master has employed (or, *semble*, has continued the employment of) the latter, knowing him to be incompetent, or without satisfying

(*a*) There can be no doubt that either the act will be renewed, or a new and amended act passed in the present session (1889).

himself that he was competent for the duties required of him (see *Laning v. N. Y. Cent. R. Co.*, 49 *New York Reps.* 521).

(b) The servant injured was not at the time acting in the master's employment.

(2) Common employment does not necessarily imply that both servants should be engaged in the same or even similar acts, so long as the risk of injury from the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which have to be considered in his wages (*Morgan v. Vale of Neath R. Co.*, 1 *L. R.*, 1 *Q. B.* 147; *Allen v. New Gas Co.*, 1 *Ex. D.* 251).

(3) The rule does not exempt a master from being liable for *personal* negligence causing injury to his servant (*Ormond v. Holland*, *E. B. & E.* 102; *Ashwix v. Stanwix*, 30 *L. J.*, *Q. B.* 183), unless the servant knew of, and presumably acquiesced in, the danger (*Griffiths v. London & St. Katharine's Docks Co.*, 13 *Q. B. D.* 259).

(1) Illustrations of general principle.—Thus, where a workman at the top of a building carelessly let fall a heavy substance upon a fellow-workman at the

bottom, the master was held not to be responsible, without proof of the incompetency of the workman causing the injury to discharge the duty in which he had been employed (*Wiggett v. Fox*, 25 L. J., Ex. 118).

(2) So in *Hall v. Johnson* (34 L. J., Ex. 222), the plaintiff was a miner in defendants' employ, as was also an underlooker whose duty it was to see that as the mine was excavated the roof should be propped up. This he neglected to do, whereby a stone fell and injured the plaintiff; but it was held that this attached no liability to the defendants, as no proof was given that they did not use due care in selecting the underlooker for his post.

(3) **Common employment.**—The driver and guard of a stage-coach; the steersman and rowers of a boat; the man who draws the red-hot iron from the forge, and the man who hammers it into shape; the person who lets down into, or draws up from, a pit the miners working therein, and the miners themselves; all these are fellow labourers within the meaning of the doctrine (*Bartonshill Coal Co. v. Reid*, 4 Jur., N. S. 767). The real test seems to be, whether they are engaged in the same pursuit.

(4) In *Morgan v. Vale of Neath R. Co.* (L. R., 1 Q. B. 149), the plaintiff was in the employ of a railway company as a carpenter, to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of railway, and some porters in the service of the company carelessly shifted an engine on a turntable, so that it struck a ladder supporting the scaffold, by which means the plaintiff was thrown to

the ground and injured. It was held, however, that he could not recover against the company, on the ground, that whenever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to that employment. (See *Locell v. Howell*, 1 C. P. D. 161.)

(5) And again, in *Tunney v. Mid. R. Co.* (L. R., 1 C. P. 291), the plaintiff was employed by a railway company as a labourer, to assist in loading what is called "a pick-up train," with materials left by platelayers and others upon the line. One of the terms of his engagement was that he should be carried by the train from Birmingham (where he resided and whence the train started) to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham after his day's work was done, the train by which he was travelling came into collision with another train, through the negligence of the guard who had charge of it, and the plaintiff was injured. The plaintiff accordingly sued the company, but the court held, that inasmuch as the plaintiff was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule, which exempts a master from responsibility for an injury to a servant through the negligence of a fellow-servant, when both are acting in pursuance of a common employment.

(6) So, again, in *Feltham v. England* (*L. R.*, 2 *Q. B.* 33), the defendant was a maker of locomotive engines, and the plaintiff was in his employ. An engine was being hoisted, for the purpose of being carried away, by a travelling crane moving on a tramway resting on beams of wood, supported by piers of brickwork. The piers had been recently repaired, and the brickwork was fresh. The defendant retained the general control of the establishment, but was not present; his foreman or manager directed the crane to be moved, having, just before, ordered the plaintiff to get on the engine to clean it. The plaintiff having got on to the engine, the piers gave way, the engine fell, and the plaintiff was injured. Here it was held that the fact that the servant who was guilty of negligence was a servant of superior authority, whose lawful directions the other was bound to obey, was immaterial; and that as there was no evidence of personal negligence on the part of the defendant, and nothing to show that he had employed unskilful or incompetent persons to build the piers, he was not liable to the plaintiff.

(7) So, where two railway companies, A. and B., have a joint staff of signalmen, and one of them gets injured through the negligence of the private engine driver of company A., such company will not be liable. For, although the injured man is the servant of A. and B., and the engine driver is the servant of A. only, yet they were engaged in a common pursuit so far as company A. were concerned, although the signalman was also engaged in a further and additional pursuit on behalf of B. (see *Suainson v. N. E.*

R. Co., 3 *Ex. Div.* 341). But where one of two companies has the user of the other's station, but not the control of its servants employed on such station, one of whom is injured by the negligence of a servant of the company having such right of user, the rule does not apply (*Warburton v. G. W. R. Co.*, *L. R.*, 2 *Ex.* 30; and see *Turner v. G. E. R. Co.*, 33 *L. T.* 431).

(8) And so the rule does not apply where one servant is the servant of a contractor, and the other is the servant of the person who employs the contractor; for the servant of the contractor is not the servant of the contractor's employer (*Parry v. Smith*, 4 *C. P. D.* 325). It must, however, be borne in mind, that it is sometimes a question of difficulty whether a person holds the position of a contractor, or of a foreman in charge of a gang of workmen; and that in the latter case the rule as to fellow-servants applies (*Charles v. Taylor*, 3 *C. P. D.* 492).

(9) **Personal negligence of master.**—In all cases (not coming under the Employers' Liability Act) where the servant sues the master for personal negligence, he must prove that the master knew or ought to have known of the danger and that the servant did not (*Griffiths v. London & St. Katharine's Docks Co.*, 13 *Q. B. D.* 259). In *Mellors v. Shaw* (30 *L. J.*, *Q. B.* 333), the defendants were owners of a coal mine, and the plaintiff was employed by them as a collier in the mine, and in the course of his employment it was necessary for him to descend and ascend through a shaft constructed by them. By the defendants' negligence the shaft was constructed

unsafely, and was, by reason of not being sufficiently lined or cased, in an unsafe condition. By reason of this, and also by reason of no sufficient or proper apparatus having been provided by the defendants to protect their miners from the unsafe state of the shaft, a stone fell from the side of the shaft on to the plaintiff's head, and he was dangerously wounded. One of the defendants was manager of the mine, and it was worked under his personal superintendence, and the plaintiff was not aware of the state of the shaft. On this state of facts the defendants were held liable.

(10) So, where a master ordered a servant to take a bag of corn up a ladder which the master knew, and the servant did not know, to be unsafe, and the ladder broke, and the servant was injured, the master was held liable (*Williams v. Clough*, 3 H. & N. 258; and see *Martin v. Connahs Quay Co.*, 33 W. R. 216; and *Griffiths v. London & St. Katharine's Dock Co.*, 13 Q. B. D. 259).

(11) But where a servant with a full appreciation of the risk which he is running assents to accept the risk, either expressly or impliedly, he cannot recover, for *volenti non fit injuria*. Therefore, where a labourer was killed through the fall of a weight, which he was raising by means of an engine to which he attached it by fastening on a clip, and the clip had slipped off, it was held that there was no case to go to the jury in an action by his representative against the master, although it appeared that another and safer mode of raising the weight was usual, and had been discarded by the master's orders (*Dyner v.*

Leach, 26 *L. J. Ex.* 221; and see also *Senior v. Ward*, 1 *E. & E.* 385; *Thomas v. Quartermaine*, 18 *Q. B. D.* 685; and *Martin v. Connahs Quay Co.*, 33 *W. R.* 216).

(12) Again, a hoarding had been erected by the defendant, a builder, which projected too far into the street, but sufficient room was left for carts to pass; a heavy machine was placed inside the hoarding and close to it. A cart, in passing, struck against the hoarding, and knocked down the machine against the plaintiff, a workman in the defendant's employ. The plaintiff had previously made some complaint of the position of the machine to his master, but voluntarily continued to work though the machine was not moved. It was here held, that there was no evidence to go to the jury of the master's liability (*Assop v. Yates*, 2 *H. & N.* 768; *Griffiths v. Gidlow*, 3 *H. & N.* 648).

(13) But the defence of *volenti non fit injuriâ* is somewhat difficult of application.

Lord Esher, M. R., in the case of *Yarmouth v. France* (19 *Q. B. D.* 647), lately stated the rule in the following words: "It seems to me to amount to this, that mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk with a full appreciation of its extent to bring the workman within the maxim *Volenti non fit injuriâ*. If so, that is a question of fact." And Lord Justice Lindley added:—"A workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it, and complains of it, cannot, in my opinion, be

held as a matter of law to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he does not refuse to face it; nor can it in my opinion be held that there is no case to submit to a jury on the question whether he has agreed to incur it, or has voluntarily incurred it or not, simply because though he protested he went on as before. . . . If nothing more is proved than that the workman saw the danger, and reported it, but on being told to go on went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred." And see, also, *Thrusell v. Handyside* (20 Q. B. D. 359).

ART. 22.—*Volunteer Servants.*

If a stranger invited by a servant to assist him in his work, or who volunteers to assist him in his work, is, while giving such assistance, injured by the negligence of another servant of the same master, he is considered to be a servant *pro tempore*, and no action will lie against the master, unless (perhaps) he were guilty of personal negligence or breach of duty, or the servants were not competent persons.

The reason of this rule is obvious, for the volunteer,

by aiding the servant, is simply of his own accord placing himself in the position of a servant, and that without the consent or request of the master. The latter cannot therefore be fairly called upon to recompense him for the result of his officiousness.

Thus, where the servants of a railway company were turning a truck on a turntable, and a person not in the employ of the company volunteered to assist them, and, whilst so engaged, other servants of the company negligently propelled a locomotive against, and so killed, the volunteer, and the servants of the company were of competent skill, and the company did not authorize the negligence, it was held that the company was not liable (*Degg v. M. R. Co.*, 1 H. & M. 773; *Potter v. Faulkner*, 1 B. & S. 800).

Exception. Where a person aids the servants of another, with such other's consent or acquiescence, not as a mere volunteer but for the purpose of expediting some business of his own, he is not considered to be in the position of a servant *pro tempore*.

Thus, where the plaintiff sent a heifer by the defendants' railway to P., and on its arrival, there being only two porters to shunt the truck, the plaintiff, in order to save delay, assisted in shunting the truck, and was injured by the negligence of one of the defendants' engine-drivers, and there was evidence that the station-master assented to his aiding in the shunting, it was held that he was entitled to recover damages (*Wright v. L. & N. W. R. Co.*, 1 Q. B. D. 252).

SUB-SECT. 2.—*UNDER EMPLOYERS' LIABILITY ACT* (a).

ART. 23.—*Epitome of Act.*

This act deprives a master of the defence of "common employment," and gives to an injured servant (or in case of his death from the injury, his personal representatives) a right of action in the county court (b) for damages not exceeding three years average earnings (c), where the five following states of fact co-exist, viz. :—

(1) Where the servant is a railway servant, labourer, husbandman, journeyman, artificer, handicraftsman, miner, or other person engaged in manual labour, *not being a domestic or menial* (d).

(2) Where the injury is due to one of the following causes, viz. :—

(a) A defect in, or unfitness of (*Paley v. Garnett*, 16 Q. B. D. 52), ways,

(a) 43 & 44 Vict. c. 42.

(b) Removeable under very exceptional circumstances to the High Court (sect. 6, and see *Munday v. Thames, &c. Co.*, 10 Q. B. D. 59).

(c) See as to this measure of damages, *Borlick v. Head*, 34 W. R. 102.

(d) Does not include an omnibus conductor. (*Morgan v. General Omnibus Co.*, 50 L. T. 687).

works, machinery, or plant (including live stock, *Yarmouth v. France*, 20 Q. B. D. 447), caused, undiscovered, or unremedied by the negligence of the master, or of a fellow-servant, whose duty it was to see to the condition thereof (*Heske v. Samuelson*, 12 Q. B. D. 30). The mere fact that a machine is dangerous does not make it defective for this purpose (*Walsh v. Whiteley*, 21 Ch. D. 371).

- (b) The negligence of a fellow-servant whose principal duty was superintendence, while superintending (*Shaffers v. General Steam, &c. Co.*, 10 Q. B. D. 356; *Gibbs v. G. W. R. Co.*, 11 *ibid.* 22; *Osborne v. Jackson*, *ibid.* 619), or the negligence of a fellow-servant in command, in consequence of obeying him.
- (c) An act or omission of a fellow-servant consequent on an improper or defective bye-law (not approved by a government department), or consequent on an improper or defective instruction of the master or his delegate.

(d) The negligence of a fellow-servant having the management of points, signals, a locomotive, or a train (see *Doughty v. Firebank*, 10 Q. B. D. 358).

(3) Where he has within six weeks of the injury, given notice (e) to the employer, and commenced his action within six months, or, in case of death, within twelve months. But in the latter case the want of notice is no bar if the judge thinks there was a reasonable excuse for not giving it.

(4) Where he has not contracted himself out of the act (*Griffiths v. Lord Dudley*, 9 Q. B. D. 357).

(5) Where he has not been guilty of contributory negligence or knowingly and volun-

(e) The form and contents of this notice are matters rather of procedure than of law, but for the convenience of the practitioner it may be stated that it should be in writing (*Moyle v. Jenkins*, 8 Q. B. D. 118), and should state *on the face of it* (*Keen v. Millwall Docks*, 8 Q. B. D. 482) the name and address of the injured servant, and the date and cause of the injury. It should be served by delivering it at, or sending it in a registered letter to, the place of business or residence of the employer. It need not, however, be technically accurate (*Stone v. Hyde*, 9 Q. B. D. 76; and see also *Previdi v. Gatti*, 36 W. R. 670).

tarily accepted or acquiesced in the risk (*Thomas v. Quartermaine*, 18 Q. B. D. 685) (*f*).

The act expires at the end of the session of parliament next after the 31st of December, 1889, but actions commenced before that date are to continue.

As several treatises on the act have been issued, I do not think that I need enlarge upon it here; but no one should attempt to advise upon it without carefully studying the act itself.

(*f*) As to what constitutes voluntary acceptance of risk, see *supra*, p. 72.

CHAPTER VI.

OF THE LIMITATION OF ACTIONS FOR TORT.

Reason for Limitation.—I have so far treated of the wrongs independent, or quasi independent, of contract, of which the law takes cognizance; and I have shown how the law gives a remedy whenever it holds any act to be wrongful, in accordance with the maxim "*ubi jus ibi remedium est.*"

But although there is always a remedy, yet, for the sake of the peace of the kingdom, a man is not allowed to enforce his remedy at his own leisure, and after a long interval, in the course of which evidence may have been entirely swept away, which, if produced, might prove the defendant's innocence.

For this and other reasons, various statutes have been from time to time passed, which confine the right of action within certain periods after its commencement—periods which, as they differ in different actions, will be more particularly mentioned in the course of the second part of this work. At this stage, I propose to examine only such rules as apply to the limitation of all actions of tort.

ART. 24.—*Commencement of Period.*

(1) When a statute limits the period within which an action is to be brought for an act

done or omitted, if the cause of action is a single act, or one which amounts to a trespass, the action must be brought within the prescribed period after the actual doing of the thing complained of.

(2) But if the cause of action is not the doing of the thing, but the resulting of damage only, the period of limitation is to be computed from the time when the party sustained the damage (*Backhouse v. Bonomi*, 9 H. L. C. 503; *Mitchell v. Darley Main Co.*, 11 App. Cas. 127).

(3) And where a tort is fraudulently concealed and the plaintiff has no reasonable means of discovering it, the statute only runs from the date of the discovery (*Gibbs v. Guild*, 9 Q. B. D. 59).

The meaning of this rule is, that where the tort is the wrongful infringement of a right, then as that constitutes *per se* a tort, so the period of limitation commences to run immediately from the date of the infringement. But, on the other hand, where the tort consists in the violation of a duty coupled with actual resulting damage, then, as the breach of duty is not of itself a tort, so the period of limitation does not commence to run until it becomes a tort by reason of the actual damage resulting from it.

(1) Thus, where A. owned houses built upon land contiguous to land of B., C., and D.; and E., being

the owner of the mines under the land of all these persons, so worked the mines that the lands of B. sank, and after more than six years' interval (the period of limitation in actions for causing subsidence), their sinking caused an injury to A.'s houses: Held, that A.'s right of action was not barred, as the tort to him was the damage caused by the working of the mines, and not the working itself (*Backhouse v. Bonomi*, *sup.*; *Mitchell v. Darley Main Co.*, *sup.*).

(2) In an action for wrongful conversion of goods (which is an injury to a right) the facts were as follows:—A.'s furniture was seized under an execution by the sheriff, and eventually it was bought by A.'s friends, and left in his possession. A. enjoyed the use of it for more than six years, and died. Upon A.'s death it was claimed by these friends, and adversely by the widow, on the ground that the Statute of Limitations barred them from claiming it after they had allowed A. to keep it for six years: it was, however, held that the statute did not begin to run until the friends had claimed the furniture, for the tort was the wrongful conversion of the goods, which had only taken place when the widow refused to give them up (*Eduardes v. Clay*, 28 *Beav.* 145; and see also *Spackman v. Foster*, 11 *Q. B. D.* 99).

ART. 25.—*Continuing Torts.*

Where the tort is continuing, or recurs,

a fresh right of action arises on each occasion (*Whitehouse v. Fellowes*, 30 *L. J.*, *C. P.* 305).

(1) Thus, where an action is brought against a person for false imprisonment, every continuance of the imprisonment *de die in diem*, is a new imprisonment, and therefore the period of limitation commences to run from the last and not the first day of the imprisonment (*Hardy v. Ryle*, 9 *B. & C.* 608).

(2) But where A. enters upon the land of B. and digs a ditch thereon, there is a direct invasion of B.'s rights, a completed trespass, and the cause of action for all injuries resulting therefrom commences to run at the time of the trespass. The fact that A. does not re-enter B.'s land and fill up the ditch does not make him a continuous wrongdoer and liable to repeated actions as long as the ditch remains unfilled, even though there afterwards arises new and unforeseen damage from the existence of the ditch (*Kansas Pac. Ry. v. Muhlman*, 17 *Kansas Rep.* 224).

(3) But where the defendants worked their mines too close to the plaintiff's land, and in consequence some cottages of the plaintiff were injured in 1868, and by reason of the *same excavation*, some more cottages were injured in 1882, it was held that the plaintiff was entitled to sue for the injuries suffered in 1882, on the ground that the tort did not consist in making the excavation, but in causing the plaintiff's land to subside; and that as often as it subsided a new cause of action arose. The *causa causans* was, no doubt, the excavation, but the cause of action was

the damage (*Mitchell v. Darley Main Co.*, 11 *App. Cas.* 127).

ART. 26.—*Disability.*

Where a person is under disability, the statute only runs from the cesser of the disability (21 Jac. 1, c. 16, s. 7; 3 & 4 Will. 4, c. 27, s. 16). But whenever the statute once begins to run, it continues to do so notwithstanding subsequent disability (*Rhodes v. Smethurst*, 4 *M. & W.* 42; *Lafond v. Ruddock*, 13 *C. B.* 819). But no action to recover land or rent can be brought after thirty years, notwithstanding disability (37 & 38 Vict. c. 57, s. 5).

By disability is meant infancy, lunacy, or idiocy, and formerly coverture; but since the Married Women's Property Act, 1882, was passed, this is no longer so, and where a tort was suffered by a married woman before that act, it has been held, that for the purposes of limitation, her right to sue first accrued on the passing of the act (*Weldon v. Neal*, 32 *W. R.* 828).

CHAPTER VII.

OF DAMAGES IN ACTIONS FOR TORT.

THE principles which govern the measure of damages in actions of tort are very loose, and, indeed, as Mr. Mayne, in his excellent treatise, has pointed out, there are many cases of tort in which no measure can be given. It will be at once apparent, however, that, putting aside circumstances of aggravation or mitigation, the compensation to be awarded in respect of an injury to property is capable of being far more accurately calculated than in respect of injury to person or reputation ; and, therefore, to some extent the principles of law are different in these two classes of cases, as will be seen from the following rules.

ART. 27.—*Damages for Personal Injury.*

There is no fixed rule for estimating damages in cases of injury to the person, reputation, or feelings, and the finding of the jury will only be disturbed—

- (a) Where the damages awarded are outrageously excessive (*Huckle v. Money*, 2 Wils. 205) ;

- (b) Where it appears that the jury acted under mistake or ill-feeling ;
- (c) Where they have given more than the plaintiff was, on his own showing, entitled to ;
- (d) Where the smallness of the award shows that they have either failed to take into consideration some essential element (*Phillips v. L. & S. W. R. Co.*, 4 Q. B. D. 406), or have compromised the question (*Bulton v. S. W. R. Co.*, 27 L. J. Ex. 355 ; *Falvey v. Stanford*, L. R., 10 Q. B. 54).

In the words of an American court, "In actions sounding in damages, where the law furnishes no rule of measurement save the discretion of the jury upon the evidence before them, courts will not disturb a verdict upon the ground of excessive damages, unless it be so flagrantly improper as to evince passion, prejudice, partiality, or corruption. Upon a mere matter of damages, where different minds might, and probably would, arrive at different results, and nothing inconsistent with an honest exercise of judgment appears, the verdict should be left as the jury found it" (*Miss. Cent. R. R. v. Caruth*, 51 Miss. Rep. 77).

(1) **False Imprisonment.**—Thus, where some working men were unlawfully imprisoned for six hours

only, being in the meantime well fed and cared for, and the jury nevertheless awarded 300*l.* to each of them, the court refused to set the verdict aside, on the ground that it seemed to them probable that the jury considered the importance of the right of personal liberty rather than the position of the plaintiffs.

(2) **Seduction.**—And so in actions for seduction, “although in point of form the action only purports to give a recompense for loss of service, we cannot shut our eyes to the fact that it is an action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example” (per *Ld. Eldon, Bedford v. M^cKowl*, 3 *Esp.* 120).

(3) **Assault.**—So in actions for assault and battery, the court will seldom interfere; and the jury may take the circumstances into consideration, and aggravate or mitigate the damages accordingly.

Thus, to beat a man publicly is a greater insult and injury than to do so in private, and is accordingly ground for aggravation of damages (*Tullidge v. Wade*, 8 *Wils.* 18).

(4) **Defamation.**—So for defamation, the damages are almost wholly in the discretion of the jury (*Kelly v. Sherlock*, *L. R.*, 1 *Q. B.* 686), and the court will seldom interfere with their verdict.

ART. 28.—*Damages for Injury to Property.*

(1) The damages in respect of injuries to property are to be estimated upon the basis of being compensatory for the deterioration in value caused by the wrongful act of the defendant, and for all natural and necessary expenses incurred by reason of such act (see *Rust v. Victoria Dock Co.*, 56 L. T. 216).

(2) Where the plaintiff is merely the possessory and not the real owner, he may, as against the defendant, recover the entire value; but as against the real owner, only the value of his limited interest (*Heydon and Smith's Case*, 13 Co. 68).

(1) **Injury to Horse.**—Thus, in the case of injury to a horse through the defendant's negligence, it has been held, that the measure of damages is the keep of the horse at the farrier's, the amount of the farrier's bill, and the difference between the prior and subsequent value of the horse (*Jones v. Boyce*, 1 Stark. 493; and see *Wilson v. Newport Dock Co.*, L. R., 1 Ex. 187).

(2) **Conversion.**—So, for the conversion of chattels, the full market value of the chattel at the date of the conversion, is, *in the absence of special damage*, the true measure. Thus, where the plaintiff purchased champagne, lying at the defendant's wharf, at fourteen shillings per dozen, and resold it at twenty-four shillings to the captain of a ship about to leave

England, and the defendants wrongfully refused to deliver up the wine, and converted it to their own use, it was held, in an action of trover, that although the defendants had no knowledge of the sale, or of the purposes for which the plaintiff required delivery of the champagne, yet the plaintiff was entitled as damages to the price at which he had sold it (*France v. Gaudet*, *L. R.*, 6 *Q. B.* 199).

(3) **Trespass.**—So, where coal has been taken by working into the mine of an adjoining owner, the trespasser will be treated as the purchaser at the pit's mouth, and must pay the market value of the coal at the pit's mouth, less the actual disbursements (not including any profit or trade allowances) for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal (*In re United Merthyr Coll. Co.*, *L. R.*, 15 *Eq.* 46).

ART. 29.—*Consequential Damages.*

Where any special damages have naturally, and in sequence, resulted from the tort, they may be recovered: but not otherwise.

The difficulty in cases under this rule, is to determine what damages are the *natural* result, and what are too remote.

(1) **Loss of Business.**—If, through the wilful or negligent conduct of another, one should receive corporal injury, whereby he is partially or totally prevented from attending to his business, the pecu-

niary loss suffered in consequence may be recovered. The most usual instances of this are to be found in actions against railway companies (*Phillips v. L. & S. W. Ry. Co.*, 4 Q. B. D. 406). But in a recent case, it has been held that mere mental shock due entirely to fright, and not arising from corporal injury, was too remote to afford a ground for damages (*Victorian Ry. Co. v. Coultas*, 13 App. Cas. 222).

(2) **Medical Expenses.**—So, the medical expenses incurred may be recovered if they form a legal debt owing from the plaintiff to the physician, but not otherwise (*Dixon v. Bell*, 1 Stark. 289; and see *Spark v. Heslop*, 28 L. J., Q. B. 197).

(3) **Loss of Property.**—The plaintiff was travelling with other passengers in the carriage of a railway company, and on the tickets being collected, there was found to be a ticket short. The plaintiff was wrongly charged by the collector with being the defaulter, and on his refusing to pay was removed by the officers of the company, without unnecessary violence. In an action for assault, it was held, that the loss of a pair of race-glasses, which the plaintiff had left behind him in the carriage when he was removed, and which were not proved to have come into the possession of any of the company's servants, was not such a natural consequence of the assault as to be recoverable (*Glover v. L. & S. W. R. Co.*, L. R., 3 Q. B. 25; and see as to remoteness, *Sanders v. Stuart*, 1 C. P. D. 326).

(4) **Lord Campbell's Act.**—The damages awarded under Lord Campbell's Act to the relatives of persons killed through the default of the defendant,

should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life of the deceased (*Franklin v. S. E. R. Co.*, 3 *H. & N.* 211). But the jury cannot, in such cases, take into consideration the grief, mourning and funeral expenses to which the survivors were put. And this seems reasonable, for in the ordinary course of nature the deceased would have died sooner or later, and the grief, mourning and funeral expenses would have had to be borne then, if not at the time they were borne (*Blake v. Mid R. Co.*, 21 *L. J.*, *Q. B.* 233; *Dalton v. S. E. R. Co.*, 27 *L. J.*, *C. P.* 227).

(5) **Injury to Trade.**—So, in estimating the damages in an action for libelling a tradesman, the jury should take into consideration the prospective injury which will probably happen to his trade in consequence of the defamation (*Gregory v. Williams*, 1 *C. & K.* 568).

(6) **Hiring Substitute.**—In cases of wrongful conversion, if the owner of the chattel has been obliged to hire another in its place, the expense to which he has been put is recoverable (*Ad.* 403).

(7) **Trespass.**—Where the defendant was in charge of the plaintiff's house, and having one day lost the key, he effected an entrance through a window by means of a ladder, and showed some strangers through the house, it was held to be a trespass. For he was only authorized to enter in the ordinary way, and therefore, when some short time afterwards the house was entered through the same window by thieves following his example, and many things

stolen, it was held to be the consequence of the defendant's wrongful entry, and that he was liable for the loss of the things stolen (*Ancaster v. Milling*, 2 D. & R. 714). I, however, entertain little doubt that this case would not be followed in the present day, as the alleged damage cannot (with great submission to the learned judges who decided the case) be said to have been the natural result of the trespass.

(8) *Infection*.—A cattle-dealer sold to the plaintiff a cow, fraudulently representing that it was free from infectious disease, when he knew that it was not, and the plaintiff having placed the cow with five others, they caught the disease and died. It was held that the plaintiff was entitled to recover as damages the value of all the cows, as their death was the natural consequence of his acting on the faith of the defendant's representation (*Mullet v. Mason*, L. R., 1 C. P. 559).

(9) In *Collins v. The Middle Level Commissioners* (L. R., 5 C. P. 279) the facts were as follows: By a drainage act, the commissioners were to construct a cut, with proper walls gates and sluices to keep out the waters of a tidal river, and also a culvert under the cut to carry the drainage from the lands on the east to the west of the cut, and to keep the same at all times open. In consequence of the negligent construction of the gates and sluices, the waters of the river flowed into the cut, and bursting its western bank flooded the adjoining lands. The plaintiff and other owners of lands on the east side of the cut closed the lower end of the culvert, which prevented

the waters overflowing their lands to any considerable extent; but the occupiers of the lands on the west side, believing that the stoppage of the culvert would be injurious to their lands, re-opened it, and so let the waters through on to the plaintiff's lands to a much greater extent. It was held, that the commissioners were liable for the whole of the damage, as the natural result of their negligence.

(10) **Having been obliged to pay Damages to a Third Party.**—So, again, a landlord, upon his tenant giving notice to quit, entered into a contract with a new tenant. Upon the expiration of the notice, the first tenant refused to quit, and the new tenant not being able to enter in consequence, brought an action against the landlord for breach of contract. It was held, that the landlord might recover, in an action against the tenant, the costs and damages to which he had been put in the action against himself; for they were the natural and ordinary result of the defendant's wrong (*Bramley v. Chesterton*, 2 C. B., N. S. 605; and see *Tindal v. Bell*, 11 M. & W. 228).

ART. 30.—*Prospective Damages.*

(1) The damages awarded, must include the probable future injury which will result to the plaintiff from the defendant's tort.

(2) But where an act of the defendant is merely the *causa causans*, and the actual cause of action or tort is injury to the plain-

tiff's property, then each such injury constitutes a fresh cause of action.

(1) In *Richardson v. Mellish* (2 Bing. 240), Best, C. J., said:—

“When the cause of action is complete, when the whole thing has but one neck, and that neck has been cut off by one act of the defendant, it would be mischievous to say—it would be increasing litigation to say—‘You shall not have all you are entitled to in your first action, but you shall be driven to a second, third, or fourth for the recovery of your damages.’” A corollary to this rule is, that several actions cannot be brought in respect of the same injury. Therefore, where a bodily injury at first appeared slight, and small damages were awarded, but subsequently it became a very serious injury, it was held that another action would not lie; for the action having been once brought, all damages arising out of the wrong were satisfied by the award in the action (*Fetter v. Beale*, 1 *Ld. Raym.* 339—692).

(2) But if the tort be a continuing tort, the principle does not apply; for here a fresh cause of action arises *de die in diem*. Thus, in a continuing trespass or nuisance, if the defendant does not cease to commit the trespass or nuisance after the first action, he may be sued until he does. Whether, however, there is a continuing tort, or merely a continuing damage, is often a matter of difficulty to determine.

(3) In the recent case of *Mitchell v. Darley Main Co.* (11 *App. Cas.* 127), the defendant worked his mines too close to the plaintiff's property, and in

consequence some cottages of the plaintiff were injured in 1868, and were repaired by the defendant. In 1882, in consequence of the same workings which caused the damage of 1868, a further subsidence took place, and the plaintiff's cottages were again injured. The case turned on the question of whether the plaintiff was barred by the Statute of Limitations, but incidentally it was decided that the tort was not the excavation, but the causing the plaintiff's land to subside. The excavation was no doubt the remote cause of the tort (the *causa causans*), but the tort itself was the infringement of the plaintiff's right of support, and consequently each separate subsidence was a distinct and separate cause of action.

(4) So, also, where the same wrongful act causes damage to goods, and also damage to the person, it has been held that there were two distinct causes of action, for which separate proceedings might be prosecuted (*Brunsdon v. Humphrey*, 14 Q. B. D. 141, Coleridge, C. J., *dissentiente*).

ART. 31.—*Aggravation and Mitigation.*

The jury may look into all the circumstances, and at the conduct of both parties, and see where the blame is, and what ought to be the compensation according to the way the parties have conducted themselves (*Davis v. L. & N. W. R. Co.*, 7 W. R. 105).

(1) *Seduction under Guise of Courtship.*—In seduc-

tion, if the defendant have committed the offence under the guise of honourable courtship, that is ground for aggravating the damages; not, however, on account of the breach of contract, for that is a separate offence, and against a different person. "The jury did right in a case where it was proved that the seducer had made his advances under the guise of matrimony, in giving liberal damages; and if the party seduced brings an action for breach of promise of marriage, so much the better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly treated the defendant, and permitted him to pay his addresses to his daughter" (Wilmot, C. J., in *Tullidge v. Wade*, 3 Wils. 18).

(2) On the other hand, the previous loose or immoral character of the party seduced, is ground for mitigation. The using of immodest language, for instance, or submitting herself to the defendant under circumstances of extreme indelicacy.

(3) **Plea of Truth in Defamation.**—In actions for defamation, a plea of truth is matter of aggravation unless proved, and may be taken into consideration by the jury in estimating the damages (*Warwick v. Foulkes*, 12 M. & W. 508).

(4) **Plaintiff's bad Character in Defamation.**—Evidence of the plaintiff's *general bad character* is allowed in mitigation of damages in cases of defamation; for, as is observed in Mr. Starkie's book on "Evidence," "To deny this, would be to decide that a man of the worst character is entitled to the same measure

of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant; a virtuous woman with the most abandoned prostitute." Such evidence cannot, however, be given, unless the facts on which the defendant relies to support his contention are expressly pleaded, so as to enable the plaintiff to meet them if he can (see Judgment of Cave, J., in *Scott v. Sampson*, 8 Q. B. D. 491, and cases there cited). But although evidence of general bad character is admissible if pleaded, evidence of rumours and suspicions to the same effect as the defamatory matter is not admissible, as they only indirectly tend to affect the plaintiff's reputation (*ib.*).

(5) **Plaintiff's irritating Conduct in Defamation.**—

In *Kelly v. Sherlock* (L. R., 1 Q. B. 686), the action was brought in respect of a series of gross and offensive libels contained in the defendant's newspaper. It appeared, however, that the first libel originated in the plaintiff having preached, and published in the local papers, two sermons reflecting on the magistrates for having appointed a Roman Catholic chaplain to the borough gaol, and on the town council for having elected a Jew as their mayor, and the plaintiff had, soon after the libels had commenced, alluded, in a letter to another paper, to the defendant's paper as "the dregs of provincial journalism," and he had also delivered from the pulpit, and published, a statement to the effect that some of his opponents had been guilty of subornation of perjury in relation to a charge of assault of which

the plaintiff had been convicted. The jury having returned a verdict for a farthing damages, the court refused to interfere with the verdict on the ground of its inadequacy, intimating that although, on account of the grossness and repetition of the libels, the verdict might well have been for larger damages, yet it was a question for the jury, taking the plaintiff's own conduct into consideration, what amount of damages he was entitled to, and that the court ought not to interfere.

(6) **Imprisonment on False Charge of Felony.**—In false imprisonment and assault, if the imprisonment has been upon a false charge of felony, where no felony has been committed, or no reasonable ground for suspecting the plaintiff, this will be matter of aggravation.

(7) **Battery in consequence of Insult.**—But if an assault and battery have taken place in consequence of insulting language on the part of the plaintiff, this will be ground for mitigating the damages (*Thomas v. Powell*, 7 C. & P. 807).

(8) **Insolent Trespass.**—Where a person trespassed upon the plaintiff's land, and defied him, and was otherwise very insolent, and the jury returned a verdict for 500*l.* damages, the court refused to interfere, Chief Justice Gibbs saying, "Suppose a gentleman has a paved walk before his window, and a man intrudes, and walks up and down before the window, and remains there after he has been told to go away, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a half-penny for you, which is the full extent of all the

mischief I have done'? Would that be a compensation?" (*Merest v. Harvey*, 5 Taunt. 441).

(9) **Wrongful Seizure.**—And so where the defendant wrongfully seizes another's chattels, and exercises dominion over them: substantial damages will be awarded for the invasion of the right of ownership (*Baylis v. Fisher*, 7 Bing. 153).

(10) **Causing Suspicion of Insolvency.**—And where the defendant took the plaintiff's goods under a false claim, whereby certain persons concluded that the plaintiff was insolvent, and that the goods had been seized under an execution, it was held that exemplary damages might be given (*Brewer v. Dew*, 11 M. & W. 629).

ART. 32.—*Presumption of Damage against a Wrong-doer.*

If a person who has wrongfully converted property, refuses to produce it, it will be presumed as against him to be of the best description (*Armory v. Delamirie*, 1 Sm. L. Ca. 315).

(1) Thus, in the above case, where a jeweller who had wrongfully converted a jewel which had been shown to him, and had returned the socket only, refused to produce it in order that its value might be ascertained, the jury were directed to assess the damages on the presumption that the jewel was of the finest water, and of a size to fit the socket; for *Omnia præsumuntur contra spoliatorem*.

(2) So, where a diamond necklace was taken away, and part of it traced to the defendant, it was held that the jury might infer that the whole thing had come into his hands (*Mortimer v. Craddock*, 12 L. J., C. P. 166).

ART. 33.—*Damages in Actions of Tort founded on Contract.*

The damages in actions of tort founded upon contract, must be estimated in the same way as they are estimated in breach of contract; for a man cannot, by merely changing the form of his action, put himself in a better position (see *Chinery v. Viall*, 5 H. & N. 295; *Johnson v. Stear*, 33 L. J., C. P. 130).

Therefore, since in breaches of contract the damages are limited to injuries which may reasonably be presumed to have been foreseen by both parties at the time of contracting, a man cannot sue for extraordinary, though consequential, damages, unless those damages were within the contemplation of both parties at the time of making the contract, either by express intimation (*Hadley v. Baxendale*, 9 Ex. 354; *Sanders v. Stewart*, 1 C. P. D. 326), or by implication from the surrounding circumstances (*Simpson v. L. & N. W. R. Co.*, 1 Q. B. D. 274; *Jameson v. Mid. Ry. Co.*, 49 L. T. 426; and *Schultze v. G. E. Ry. Co.*, 19 Q. B. D. 30).

ART. 34.—*Joint Tort-feasors jointly and severally
liable for Damages.*

Persons who jointly commit a tort may be sued jointly or severally; and if jointly, the damages (a) may be levied from both or either (*Hume v. Oldacre*, 1 Stark. 252; *Blair v. Deakin*, 57 L. T. 522); and if from one, he has no right to contribution by the other (*Merryweather v. Nixon*, 8 T. R. 186).

(a) As to costs, see *Sturm v. Dixon*, 22 Q. B. D. 99.

CHAPTER VIII.

OF INJUNCTIONS TO PREVENT THE CONTINUANCE OF
TORTS.

Definition.—An injunction is an order of the Court of Appeal, or the High Court of Justice, or any division or judge of either of them, or of a county court (*a*), restraining the commission or continuance of some act of the defendant.

Interlocutory or perpetual.—Injunctions are either interlocutory or perpetual. An interlocutory injunction is a temporary injunction, granted summarily on motion founded on an affidavit, and before the facts in issue have been formally tried and determined. A perpetual injunction is one which is granted after the facts in issue have been tried and determined, and is given by way of final relief.

ART. 35.—*Injuries Remediable by Injunction.*

(1) Wherever a legal right in property (or possibly in some cases where a mere *personal*

(*a*) A county court has now, in actions within its jurisdiction, power to grant an injunction against a nuisance and to commit to prison for disobedience thereof (*Ex parte Martin*, 4 Q. B. D. 212; *Martin v. Bannister*, *ib.* 491).

right) exists, a violation of that right will be prohibited in all cases where the injury is such as is not susceptible of being adequately compensated by damages, or at least not without the necessity of a multiplicity of actions for that purpose (*Aslatt v. Corporation of Southampton*, 16 Ch. D. 143).

(2) An injunction will not be granted where the injury is trivial in amount, or where the court, in its discretion, considers that damages should alone be given (see 21 & 22 Vict. c. 27; *Kino v. Rudkin*, 6 Ch. D. 160; *Fritz v. Hobson*, 14 Ch. D. 542).

(1) Thus, where substantial damages would be, or have been, recovered for injury done to land, or the herbage thereon, by smoke or noxious fumes, an injunction will be granted to prevent the continuance of the nuisance; for otherwise the plaintiff would have to bring continual actions (*Tipping v. St. Helens' Smelting Co.*, L. R., 1 Ch. 66).

(2) And so where a railway company, for the purpose of constructing their works, erected a mortar mill on part of their land close to the plaintiff's place of business, so as to cause great injury and annoyance to him by the noise and vibration, it was held that he was entitled to an injunction to restrain the company from continuing the annoyance (*Fenwick v. East London R. Co.*, L. R., 20 Eq. 544).

(3) As the atmosphere cannot rightfully be infected with noxious smells or exhalations, so it

should not be caused to vibrate in a way that will wound the sense of hearing. Noise caused by the ringing of church bells, if sufficient to annoy and disturb residents in the neighbourhood in their homes or occupations, is a nuisance, and will be prohibited (*Soltau v. De Held*, 2 Sim. N. S. 133; *Harrison v. St. Mark's Church*, 15 Albany Law J. 248).

(4) So, where one has gained a right to the free access of light to his house, and buildings are erected which cause a substantial privation of light sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises, an injunction will be granted *if the deprivation of light is such as would support a claim for substantial damages*. For, as was said by Sir W. Page Wood, V.-C., in *Dent v. Auction Mart Co.* (L. R., 2 Eq. 246), "Having arrived at this conclusion with regard to the remedy which would exist at law, we are met with the further difficulty, that in equity we must not always give relief (it was so laid down by Lord Eldon and Lord Westbury) where there would be relief given at law. Having considered it in every possible way, I cannot myself arrive at any other conclusion than this, that where substantial damages would be given at law, as distinguished from some small sum of 5*l.*, 10*l.*, or 20*l.*, this court will interpose, and on this ground, that it cannot be contended that those who are minded to erect a building that will inflict an injury upon their neighbour, have a right to purchase him out, without an act of parliament for that

purpose." Sir G. Jessel, M. R., commenting upon the above passage in *Aynsley v. Glover* (L. R., 18 Eq. 552), says: "It seems to me that that gives a reasonable rule, whatever the law may have been in former times. As I understand it, the rule now is—and I shall so decide in future, unless in the meantime the Appeal Court shall decide differently,—that wherever an action can be maintained at law, and really substantial damages, or perhaps I should say considerable damages (for some people may say that 20l. is substantial damages), can be recovered at law, there the injunction ought to follow in equity, generally, not universally, because I have something to add upon that subject." His Lordship then, commenting upon the power given to him of awarding damages in substitution for an injunction, proceeded as follows: "It must be for the court to decide, upon consideration, to what cases the enactment (21 & 22 Vict. c. 27) should be held to apply. In the case of *The Currier's Company v. Corbet* (2 Dr. & Sm. 355), we have an instance in which a judge has said that the act ought to apply in some cases. I had one before me, in which, there being comparatively a very trifling injury, although sufficient perhaps to maintain an injunction, comparing that with the injury inflicted upon the defendant, I thought, under the special circumstances, damages should be given instead of an injunction. I am not now going, and I do not suppose that any judge will ever do so, to lay down a rule which, so to say, will tie the hands of the court. The discretion being a reasonable discretion, should, I think, be reasonably exercised, and

it must depend upon the special circumstances of each case whether it ought to be exercised. The power has been conferred, no doubt usefully, to avoid the oppression which is sometimes practised in these suits by a plaintiff who is enabled—I do not like to use the word ‘extort,’ but—to obtain a very large sum of money from a defendant, merely because the plaintiff has a legal right to an injunction. I think the enactment was meant, in some sense or another, to prevent that course being successfully adopted. But there may be some other special cases to which the act may be safely applied, and I do not intend to lay down any rule upon the subject. If I had found by the evidence, that there was in this case a clear instance of very slight damage to the plaintiffs—that is, some 20*l.*, or 30*l.*, or 40*l.*, but still very slight—I should be disposed to hold that that was a case in which this court would decline to interfere by injunction, having regard to the new power conferred upon me by Lord Cairns’ Act to substitute damages for it” (and see also *Smith v. Smith*, *L. R.*, 20 *Eq.* 505; *Nat. Provincial Plate Glass Co. v. Prudential Ass. Co.*, 6 *Ch. D.* 757; *Kino v. Rudkin*, *ib.* 160; and *Holland v. Worley*, 26 *Ch. D.* 578).

(5) And so it has been laid down in an American court, that injunctions are to prevent irreparable mischief, and stay consequences that cannot be adequately compensated; their allowance is discretionary and not of right, calls for good faith in the plaintiff, and may be withheld if likely to inflict greater injury than the grievance complained of. It is an irre-

parable injury to create intolerable smells near the homestead of a neighbour, or to undermine his house by excavations; to cut him off from the street by buildings or ditches, or otherwise destroy the comfortable, peaceful and quiet occupation of his homestead; also to break up his business, destroy its goodwill, and inflict damages that cannot be measured, because the elements of reasonable certainty are wanting in computing them (*Edwards v. Allouez*, &c., 38 *Michigan Rep.* 46).

(6) Where there is a *mere trespass*, the court will not interfere, because the proper remedy is by an action for damages, or an action of ejectment. But if, in addition to the trespass, the trespasser is actually working the destruction of the estate (as by cutting down the timber or working a mine on it, or by building on it, or altering buildings on it), an injunction will be granted (see *Drewry on Injunctions*, 184 *et seq.*; and *Joyce on Injunctions*, 131).

(7) Where the sewage of a town was carried from a brook which, passing through a man's land, fed a lake also on such land, and the sewage thus discharged had for several years fouled the water of the lake, so that from being pure drinking water it gradually became quite unfit for drinking, an injunction was granted (*Goldsmid v. Tunbridge Wells Improvement Coms.*, *L. R.*, 1 *Eq.* 161).

(8) Again, deprivation of lateral or subjacent support, in cases where a jury would give considerable damages, is sufficient ground for an injunction.

(9) So infringements of trade marks, copyright, and patent right, are peculiarly remediable by in-

junction; for not only are they continuing wrongs to proprietary rights, but damages never could properly compensate the persons whose rights are invaded.

(10) On the other hand, it used to be held that there is no injunction to restrain the publication of a personal libel (*Gee v. Pritchard*, 2 *Swans.* 462; *Clark v. Freeman*, 11 *Bea.* 112), for it does not concern property, and property was held to be the subject-matter of the jurisdiction; and probably it is still true "that, as a general rule, the court only interferes where there is some question as to property. I do not think that the interference of the court is absolutely confined to that now; there may be cases in which the court would interfere even when personal *status* is the only thing in question" (per Jessel, M. R., *Aslatt v. Corp. of Southampton*, 16 *Ch. D.* 148; *Judic. Act*, 1873, s. 25, sub-s. 8). And where personal *status* was the chief question involved (the status of an alderman of a borough), the fact that the corporation possessed property, the management of which was vested in the mayor, aldermen, and burgesses, was held sufficient to give the court jurisdiction (*Aslatt v. Corp. of Southampton*, *sup.*). And so where a libel refers to property, an injunction will be granted; as, for instance, where it is injurious to the plaintiff's trade (*Thomas v. Williams*, 14 *Ch. D.* 864, and *Thorley's Cattle Food Co. v. Massam*, *ib.* 764; *Hermann Loog v. Bean*, 26 *Ch. D.* 306; *Hayward v. Hayward*, 34 *Ch. D.* 198; and *Liverpool, &c. Association v. Smith*, 37 *Ch. D.* 170).

(11) The courts have held that the writer of private letters has such a qualified property in them

as will entitle him to an injunction to restrain their publication by the party written to, or his assignees (Drew. Inj. 208; *Pope v. Curl*, 2 At. 342). And the party written to has such a qualified right of property in them as will entitle him, or his personal representatives, to restrain their publication by a stranger, unless such right is displaced by some personal equity, or by grounds of public policy (Drew. Inj. 309; *Granard v. Dunkin*, 1 B. & Beat. 207; *Percival v. Phipps*, 2 V. & B. 19).

ART. 36.—*Threatened Injury.*

The court will not in general interfere until an actual tort has been committed; but it may, by virtue of its jurisdiction to restrain acts which when completed will result in a ground of action, interfere before any actual tort has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance or trespass (Kerr, Inj. 339).

So where a man threatens, or begins to do, or insists upon his right to do, certain acts, the court will interfere before any actual damage or infringement of any right has actually taken place, if the circumstances are such as to enable it to form an opinion as to the illegality of the acts complained of and the irreparable injury which will ensue (*Palmer*

v. Paul, 2 L. J., Ch. 154; *Elliott v. N. E. R. Co.*, 10 H. L. Cas. 333). But if the injury is only problematical, according as other circumstances may or may not arise, or if there is no pressing need for an injunction, the court will not grant it until a tort has actually been committed (*Kerr, Inj.* 339).

ART. 37.—*Public Convenience does not justify the continuance of a Tort.*

It is no ground for refusing an injunction that it will, if granted, do an injury to the public. Even where parliament has authorized a public body to carry out a public work, that does not authorize the body to carry it out in such manner or place as will cause a nuisance, *if it can be carried out otherwise* (see *Truman v. L. B. & S. C. R. Co.*, 11 App. Cas. 45).

Thus, in the case of *The Attorney-General v. Birmingham Corporation* (4 K. & J. 528), where the defendants had poured their sewage into a river, and so rendered its water unfit for drinking and incapable of supporting fish, it was held that the legislature not having given them express powers to send their sewage into the river, their claim to do so, on the ground that the population of Birmingham would be injured if they were restrained from carrying on their operations, was untenable (see also *Spokes v. The*

Banbury Board of Health, L. R., 1 *Eq.* 42; *Goldsmid v. Tunbridge Wells Improvement Coms.*, *sup.*; and *Hill v. Met. Asylums Board*, 6 *App. Cas.* 193). The same rule is observed in the United States (*Weir's Appeal*, 74 *Penn. St. Rep.* 230, and *Meigs v. Lester*, 23 *New Jersey Eq.* 199).

ART. 38.—*Mandatory Injunctions.*

Where an injunction is asked, not merely prohibiting an act, but ordering some act to be done, it in general requires a stronger case to be made out than where a mere prohibition is asked for, especially where the injunction is interlocutory (*Deere v. Guest*, 1 *M. & C.* 516; *Durrell v. Pritchard, L. R.*, 1 *Ch.* 250; *Clark v. Clark, L. R.*, 1 *Ch.* 16).

(1) Thus, where a man has actually built a house which interferes with his neighbour's ancient lights, the court will not order him to take it down, except in cases in which extreme, or at all events very serious, damage would ensue if its interference were withheld. For in such case the injury to the defendant by the removal of his building would generally be out of all comparison to the injury to the plaintiff, and that is a consideration which ought to have great weight (see *Nat. Prov. Plate Glass Co. v. Prudential Ass. Co.*, 6 *Ch. D.* 761).

(2) And so where an injunction was asked, ordering the defendants to pull down some new buildings,

on two grounds, namely, 1st, that a right of way was obstructed by the new buildings; and, 2ndly, that the new buildings obstructed the light and air; it was held that no injunction ought to be granted, because, as was said by the Lord Justice Turner, "as to none of these grounds does it seem to me that there is any such extreme or serious damage as could justify the mandatory injunction which is asked. As to the first ground, the right of way is not wholly stopped. The question is one merely of the comparative convenience of the right of way as it formerly existed, and as it now exists. As to the second ground, I think that the diminution of light and air to the plaintiff's houses is not such as would warrant us in granting the relief which is asked" (*Durrell v. Pritchard*, *sup.*).

ART. 39.—*Delay in seeking Relief.*

A person who has not shown due diligence in applying to the court for relief, will, in general, be debarred from obtaining an interlocutory injunction; but he will not be thereby debarred from obtaining an injunction at the hearing of the cause, unless his delay has been of such long duration as wholly to have deprived him of the right which he originally had (per Lord Langdale, in *Gordon v. Cheltenham R. Co.*, 5 B. 233).

CHAPTER IX.

THE EFFECT OF THE DEATH OR BANKRUPTCY OF EITHER PARTY.

ART. 40.—*Death generally destroys the Right of Action.*

(1) As a general rule, the right to sue, and the liability to be sued for torts, ceases with the life of either party.

(2) This rule does not apply where the tort consists of :—

(a) The appropriation by the defendant of property, or the proceeds or value of property, belonging to the plaintiff (*Phillips v. Homfray*, 24 *Ch. D.* 439); or

(b) An injury to real or personal property committed *by the deceased* within six calendar months of his death (3 & 4 *Will. 4*, c. 42, s. 2; see *Kirk v. Todd*, 21 *Ch. D.* 484)(a); or

(a) Must be brought within six months of constitution of a personal representative.

- (c) An injury to *real* property of the deceased, committed within six calendar months of his death (*Ib.*)(b); or
- (d) An injury to goods and chattels of the deceased (4 Edw. 3, c. 7; 25 Edw. 3, c. 5); or
- (e) An injury causing the death of the deceased, if he or she leaves a wife, husband, parent, or child (9 & 10 Vict. c. 93, s. 1)(c).

The rule is usually expressed in the form of a Latin maxim, "*actio personalis moritur cum personâ.*" Thus, if one is assaulted or libelled, or assaults or libels another, and dies; in the one case the assaulter or libeller is acquitted, and in the other the assaulted or libelled party is left without any remedy, however severely he may have been injured. It would seem that this state of the law might, without disadvantage, be reconsidered by the Legislature.

It may be observed that under paragraph (b), where an action is actually pending if the defendant dies *pendente lite*, the action dies with him, unless the tort was committed within the six months immediately preceding his death (*Kirk v. Todd, ubi supra*).

(b) Must be brought within twelve months of death.

(c) As to this Act, commonly called Lord Campbell's Act, *vide infra*, under the Chapter on Negligence. Strictly, such actions are not survivals of a cause of action belonging to the deceased, but are remedies for a statutory tort of a very special nature.

ART. 41.—*Effect of Bankruptcy.*

(1) The right of action belonging to one who becomes bankrupt, is not affected by his bankruptcy, unless it causes actual loss to his estate, in which case the right passes to his trustee (see *Wright v. Fairfield*, 2 B. & Ad. 727; *Beckham v. Drake*, 2 H. L. C. 577; *Brewer v. Dew*, 11 M. & W. 625; *Hodgson v. Sidney*, L. R., 1 Ex. 313; *Ex parte Vine*, 8 Ch. D. 364).

(2) A right of action for tort against one who becomes bankrupt, is not destroyed by the bankruptcy, nor can the plaintiff prove in the bankruptcy for compensation (46 & 47 Vict. c. 52, s. 30, sub-s. 2, and s. 37; *Watson v. Holliday*, 20 Ch. D. 780; 52 L. J., Ch. 543).

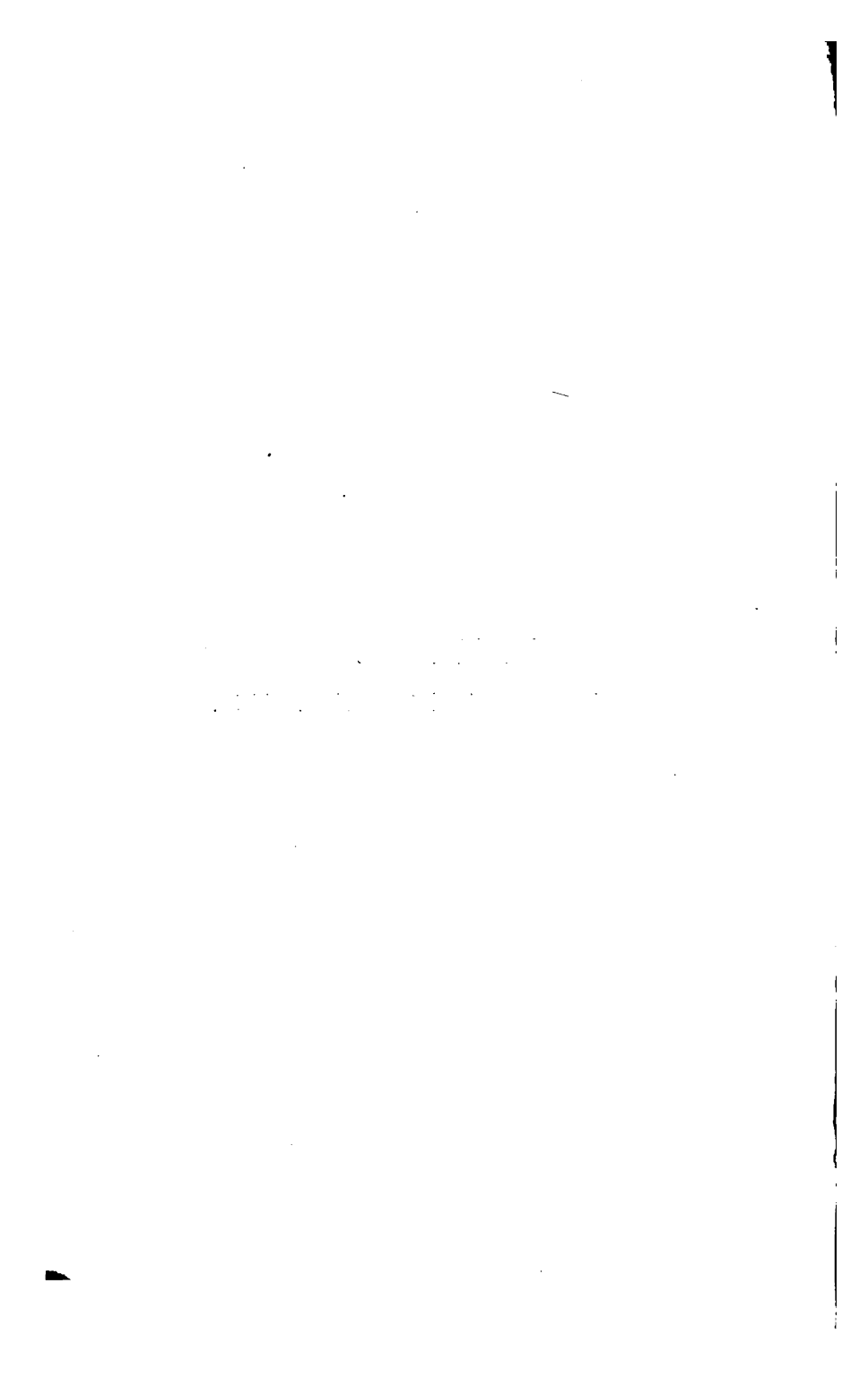
(1) Thus a bankrupt may, even during the continuance of the bankruptcy, sue another for libel or assault, or for seduction (*Beckham v. Drake*, *supra*); and may, it is conceived, keep any damages which he may recover for his own use and benefit (*Ex parte Vine*, *supra*).

(2) And so where the tort, although one in respect of property, does not cause any actual damage to it, but merely interferes with the plaintiff's abstract right, the right of action remains in him and does not pass to the trustee (*Brewer v. Dew*, *supra*).

(3) But where a tort in respect of property causes actual damage, so as to inflict loss on the bankrupt's creditors, the right of action passes to the trustee, and the bankrupt loses the right of suing for the abstract tort to his right (*Brewer v. Dew, supra*; and *Hodgson v. Sidney, supra*), unless there were two distinct causes of action (*Ib.*).

PART II.

RULES RELATING TO PARTICULAR TORTS.



CHAPTER I.

TORTS FOUNDED ON MALICE (a).



SECT. I.

OF LIBEL AND SLANDER.

ART. 42.—*Definitions of Libel and Slander.*

(1) Libel is a false, defamatory and malicious writing, picture, or the like, tending to injure the reputation of another.

(2) Slander is a false, defamatory and malicious verbal statement tending to injure the reputation of another.

(3) A libel is of itself an infringement of a right, and no actual damage need be proved in order to sustain an action. Slander, on the other hand, is not of itself an infringement of a right, unless damage ensues, either actually or presumptively.

Analysis of libel and slander.—It will be perceived that in order to found an action, whether for libel or slander, four distinct factors must be present.

(1) The imputation conveyed by the writing, picture or words must be false, for truth is a good defence to an action, or, in technical language, is a justification

(a) Malice is the conscious violation of law to the prejudice of another.

(*Watkin v. Hall*, L. R., 3 Q. B. 400; *Gourley v. Plimsohl*, L. R., 8 C. P. 362; *Leyman v. Latimer*, 3 Ex. D. 352). (2) The imputation must be defamatory. (3) The imputation must have been published. (4) The imputation must have been either expressly or impliedly malicious. And in the case of *slander*, but not of *libel*, a fifth factor must exist, viz., actual damage must be proved, unless it can be implied from the nature of the defamatory words. In the succeeding articles, questions which occur as to the nature of defamatory imputations, publication, and malice, and, in the case of *slander*, the nature of the resulting damage, will be more fully elucidated. It suffices, at this point, to say that if any one of the first four factors above enumerated in case of *libel*, or of the whole five in case of *slander*, is absent, no tort has been committed.

ART. 43.—*What is Defamatory.*

(1) Defamatory words or pictures are such as impute conduct or qualities tending to disparage or degrade the plaintiff (*Digby v. Thompson*, 4 B. & A. 821); or to expose him to contempt, ridicule, or public hatred, or to prejudice his private character or credit (*Gray v. Gray*, 34 L. J., C. P. 45); or to cause him to be feared or avoided (*Ianson v. Stuart*, 1 T. R. 748; *Walker v. Brogden*, 19 C. B., N. S. 165).

(2) A statement disparaging in intention, and so understood by the person to whom it was published, is none the less actionable because, if taken literally, it would not be defamatory.

Illustrations of directly defamatory words.—

(1) Thus, describing another as an infernal villain is a disparaging statement sufficient to sustain an action (*Bell v. Stone*, 1 B. & P. 331); and so is an imputation of insanity (*Morgan v. Lingen*, 8 L. T., N. S. 800); or insolvency, or impecuniousness (*Met. Saloon Omnibus Co. v. Hawkins*, 28 L. J., Ex. 201; *Eaton v. Johns*, 1 Dougl., N. S. 612); or of gross misconduct (*Clement v. Chivis*, 9 B. & C. 176); or of cheating at dice (*Greville v. Chapman*, 5 Q. B. 744); or of ingratitude (*Cox v. Lee*, L. R., 4 Ex. 284).

(2) So, reflections on the professional and commercial conduct of another are defamatory; as, for instance, to say of a physician that he is a quack; and even to advertise pills as prepared by him (contrary to the fact) would probably be a libel (*Clark v. Freeman*, 11 Bear. 117). So, also, calling a newspaper proprietor "a libellous journalist" is defamatory (*Wakeley v. Cooke*, 4 Ex. 518).

Illustrations of indirectly defamatory words.—(3) A statement may be none the less defamatory because it is in the form of an ironical compliment. Thus, if one said of another that he was so valuable a citizen that the government had sent him to Australia for a considerable period, at the public expense, meaning

thereby, and being understood to mean, that he had been transported, that would clearly be defamatory.

(4) So, again, there may be facts known to the person publishing the libel or slander, and the person to whom it is published, which make an apparently innocent statement bear a secondary, and decidedly defamatory, construction. For instance, a statement that the speaker saw the plaintiff at Portland some years since, is primarily innocent enough ; but if the surrounding circumstances were such as to convey to the person to whom the words were addressed the insinuation that the speaker had seen the plaintiff working at Portland as a convict, the mere absence of a direct statement to that effect would not be sufficient to excuse the speaker. It must, however, be borne in mind that where a secondary meaning is to be imputed, it is necessary that the facts should be known both to the person who makes the statement and to the persons to whom it is published ; because, if facts are known to the latter from which they might reasonably suppose that the document is defamatory, but those facts are not known to the person who wrote it, if he were held liable he would be made liable for doing that which he could have no reason to suppose would injure anybody, the language used being such as in its ordinary sense would not be defamatory of anybody. Again, if there are facts known to the person who makes the statement, which, if known to the persons to whom it is made, might reasonably lead them to suppose that it was used in an ironical sense, yet, if those facts are not known to the persons to whom it is

made, that which is stated, although stated inadvertently or maliciously, could produce no effect upon their minds. Though the act might be negligent or wrongful on the part of the person making the statement, the person who received it would have no reasonable ground for understanding it in any evil sense (*Capital & Counties Bank v. Henty*, 5 C. P. D. 515).

ART. 44.—*Publication.*

The making known, knowingly or negligently, of a libel or slander to any person *other than the object of it*, is publication in its legal sense.

(1) "Though, in common parlance, that word [publication] may be confined to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual is indisputably, in law, a publishing" (*Rex v. Burdett*, 4 B. & Ald. 143). Publication, therefore, being a question of law, it is for the jury to find whether the facts, by which it is endeavoured to prove publication, are true; but for the court to decide whether those facts constitute a publication in point of law (*Street v. Licensed Victuallers' Society*, 22 W. R. 553; *Hent v. Wall*, 2 C. P. D. 146).

(2) **Telegrams and post cards.**—If the libel be contained in a telegram, or be indicted on a post card, that is publication, even though they be addressed to

the party libelled, because the telegram must be read by the transmitting and receiving officials, and the post card will in all probability be read by some person in the course of transmission (*Robinson v. Jones*, 4 L. R. Ir. 391; *Williamson v. Freer*, L. R. 9 C. P. 393):

(3) **Newsvendors.**—But the vendor of a newspaper in the ordinary course, though he is *prima facie* liable for a libel contained in it, is excused if he can prove that he did not know that it contained a libel; that his ignorance was not due to any negligence on his own part; and that he did not know, and had no ground for supposing, that the newspaper was likely to contain libellous matter (*Emmens v. Pottle*, 16 Q. B. D. 354). If he proves these facts, he will not be deemed to have published it.

ART 45.—*Malice and Privileged Communications.*

(1) Where the words or picture are defamatory, malice is generally implied; and the existence of express malice, that is to say, a conscious violation of the law to the prejudice of another (*per Campbell, C. J., Ferguson v. Earl of Kinnoull*, 9 Cl. & F. 321), is only a matter for inquiry, when the words complained of were spoken on a justifiable occasion (*Watkin v. Hall*, L. R., 3 Q. B. 396; *Speill v. Maule*, L. R., 3 Ex. 232), or where

the defamation consisted in falsely impeaching a man's right to property,—a form of defamation commonly known as "slander of title" (*Wren v. Weld*, *L. R.*, 4 *Q. B.* 730).

(2) Where a communication is made upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, either public or private, legal, moral, or social, such communication, if made to a person having a corresponding interest or duty, rebuts the inference of malice (in some cases absolutely, and in others only *primâ facie*), and is privileged (*Laughton v. Bishop of Sodor and Man*, *L. R.*, 4 *P. C.* 495; *Dawkins v. Lord Paulet*, *L. R.*, 5 *Q. B.* 94).

(3) Where the occasion is only *primâ facie*, and not absolutely, privileged, the plaintiff may rebut the inference of privilege by proving a malicious motive, such as anger or indifference to the truth. But if the defendant made the statements believing them to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable ground for his belief (*Clark v. Molyneux*, 3 *Q. B. D.* 237).

(4) The question whether a communication is privileged is for the judge, and that of

express malice for the jury (*Cook v. Wildes*, 5 E. & B. 328).

(1) **Parliamentary proceedings.**—Speeches in parliament are absolutely and irrebuttably privileged (*Stockdale v. Hansard*, 9 A. & E. 1; *Dillon v. Balfour*, 20 L. R. Ir. 601); and a faithful report in a public newspaper, of a debate of either house of Parliament, containing matter disparaging to the character of an individual which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question (*Wason v. Walter*, L. R., 4 Q. B. 73. See also 51 & 52 Vict. c. 64, s. 4). Statements of witnesses before Parliamentary Committees are also privileged (*Goffen v. Donnelly*, 6 Q. B. D. 307).

(2) **Judicial proceedings.**—Statements of a judge acting judicially, whether relevant or not, are absolutely privileged (*Scott v. Stansfield*, L. R., 3 Ex. 220); and so are those of counsel, however irrelevant and however malicious (*Munster v. Lamb*, 11 Q. B. D. 588). Solicitors acting as advocates have a like privilege (*ib.*, and *Mackay v. Ford*, 29 L. J., Ex. 404). Statements of witnesses can never be the subject of an action (*Seaman v. Netherclift*, 2 C. P. D. 53); and a military man giving evidence before a military court of inquiry, which has not power to administer an oath, is entitled to the same protection as that enjoyed by a witness under examination in a court of justice (*Dawkins v. Rokeby*, L. R., 7 H. L. 744; 23 W. R. 931). If the evidence is false, the remedy is by indictment (*Henderson v. Broomhead*, 28 L. J.,

Ex. 860). Fair and accurate reports of trials (unless obscene or demoralizing) published in a newspaper contemporaneously with the proceedings are privileged (51 & 52 Vict. c. 64, s. 3). And a similar report published by a private person would also seem to be *prima facie* privileged in the absence of express malice. On the other hand, *dicta* of Lord Halsbury and Lord Bramwell in the recent case of *Macdougall v. Knight* (*W. N.* 1889, 76), lay it down that a report of the judge's summing up, or judgment only, is not (apparently even *prima facie*) a fair report of a trial, and is only privileged if, in point of fact, the summing up or judgment gave reasonable opportunity to the reader to form a correct conclusion.

(3) **Bona fide complaint.**—A complaint addressed to an authority having power to dismiss the party complained of is *prima facie* privileged; but *aliter* if expressly malicious (*Proctor v. Webster*, 16 *Q. B. D.* 112).

(4) **Reports of meetings, and publication of public notices, &c.**—By section 4 of "The Law of Libel Amendment Act, 1888," it was enacted that a fair and accurate report published in *any newspaper* of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority, or any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes,

and the publication *at the request* of any government office or department, officer of state, commissioner of police or chief constable, of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously. But the protection intended to be afforded by that section is not available if the defendant has refused to insert in the newspaper in which the matter complained of appeared, a reasonable explanation or contradiction by, or on behalf of, the plaintiff.

(5) **Confidential advice.**—So advice given, in confidence, at the request of another, and for his protection, is privileged; and it seems that the presence of a third party makes no difference (*Taylor v. Hawkins*, 16 Q. B. 308; *Clark v. Molyneux*, *sup.*; *Manby v. Witt*, 25 L. J., C. P. 294; 18 C. B. 544; *Lawless v. Anglo-Egyptian Co., L. R.*, 4 Q. B. 262; *Jones v. Thomas*, 34 W. R. 104); but it seems doubtful whether a voluntary statement is equally privileged (see *Coxhead v. Richards*, 15 L. J., C. P. 278; and *Fryer v. Kinnersley*, 33 L. J., C. P. 96; but see *Davis v. Snead*, L. R., 5 Q. B. 608).

Thus the character of a servant given to a person requesting it, is privileged (*Gardiner v. Slade*, 18 L. J., Q. B. 313); and so, also, is the character of a person who states that she is a fit recipient of charity, given to, and at the request of, a person willing to bestow such charity, by the secretary of the Charity Organization Society (*Waller v. Loch*, 7 Q. B. D. 619).

The character of a candidate for an office, given to one of his canvassers, was held to be privileged (*Cowles v. Potts*, 34 *L. J.*, *Q. B.* 247). And it has been held by the Supreme Court of New Zealand that defamatory words *bonâ fide* spoken of a mayor at a towns meeting convened for the purpose of considering municipal business, but at which there were other persons present besides ratepayers, were privileged (*Hodges v. Glass*, 1 *Ollivier Bell & Fitzgeralds' (New Zealand) S. C. Reps.* 66).

But imputations circulated freely against another in order to injure him in his calling, however *bonâ fide* made, are not privileged. Thus a clergyman is not privileged in slandering a schoolmaster about to start a school in his parish (*Gilpin v. Fowler*, 9 *Ex.* 615).

The unnecessary transmission by a post office telegram of libellous matter, which would have been privileged if sent by letter, avoids the privilege (*Williamson v. Freer*, *L. R.*, 9 *C. P.* 393). But, on the other hand, it has been held that where by the defendant's negligence a privileged communication, intended to be made to A., was in fact placed in an envelope directed to B., whereby the defamatory matter was published to B., yet the defendant was not liable, there being no malice (*Tompson v. Dashwood*, 11 *Q. B. D.* 43).

(6) **Criticism.**—Lastly: Fair and just criticisms of literary publications and works of art are privileged, provided the private character of the author or artist be not attacked (*Thomson v. Shackell*, *M. & M.* 187;

Latimer v. Western Morning News, 25 *L. T.* 44; *Henwood v. Harrison*, *L. R.*, 7 *C. P.* 606).

Tradesmen's advertisements are within the meaning of literary publications (*Paris v. Levy*, 30 *L. J.*, *C. P.* 1).

So, too, fair criticism is allowed upon the public life of public men, or men filling public offices; such as the conduct of public worship by clergymen (*Kelley v. Tinsling*, *L. R.*, 1 *Q. B.* 699): provided such criticism does not touch upon their private lives (*Gathercole v. Miall*, 15 *M. & W.* 319; *Odger v. Mortimer*, 28 *L. T.* 472). But although the acknowledged or proved public acts of public men may be lawfully criticised, there is no privilege for publishing false and defamatory statements of fact, unless, of course, they are published in the course of parliamentary or judicial proceedings (*Davis v. Shepstone*, 11 *App. Cas.* 187).

And in the United States it has been laid down, that while a citizen has the right to criticise the official conduct of a public man with satire and ridicule, he cannot in such criticism attack his private character (*Hamilton v. Eno*, 10 *N. Y. Weekly Dig.* 403).

So the fair criticism on a matter of public and national importance (*Henwood v. Harrison*, *L. R.*, 7 *C. P.* 606), or on the conduct of persons at a public meeting (*Davis v. Duncan*, *L. R.*, 9 *C. P.* 396), is privileged.

ART. 46.—*Actual Damage essential to Action for Slander.*

(1) Actual damage being essential to an action for oral defamation, it is generally necessary to prove it; and in that case the loss complained of must be such as might fairly and reasonably have been anticipated from the slander (*Lynch v. Knight*, 9 H. L. C. 517).

(2) But damage will be presumed where the slander imputes an indictable offence (*Webb v. Beavan*, 11 Q. B. D. 609), unfitness for society (*Bloodworth v. Gray*, 7 M. & G. 334), or misconduct in, or want of some necessary qualification for, the plaintiff's office or trade (*Foulger v. Newcomb*, L. R., 2 Ex. 327).

Damage must be natural, but not necessarily legal, consequence of slander.—It was at one time considered that the special damage must be the legal and natural consequence of the words spoken, and consequently, that it was not sufficient to sustain an action of slander to prove a mere wrongful act of a third party induced by the slander, such as that he had dismissed the plaintiff from his employment, before the end of the term for which they had contracted (*Vicars v. Wilcocks*, 2 Sm. L. C. 534). However, that view of the law can no longer be considered accurate, having been dis-sented from in several cases, particularly in *Lumley v. Gye* (2 E. & B. 216), and *Lynch v. Knight* (sup.).

In the latter case Lord Wensleydale said :—"To make the words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words, not what would reasonably follow, as we might think ought to follow. . . . In the case of *Vicars v. Wilcocks*, I must say that the rules laid down by Lord Ellenborough are too restrictive. I cannot agree that the special damage must be the natural and legal consequence of the words, if true. Lord Ellenborough puts an absurd case, that a plaintiff could recover damages for being thrown into a horse-pond as a consequence of words spoken ; but, I own, I can conceive that, when the public mind was greatly excited on the subject of some base and disgraceful crime, an accusation of it to an assembled mob might, under particular circumstances, very naturally produce that result, and a compensation might be given for an act occurring as a consequence of an accusation of that crime."

(1) **Examples of actual damage.**—Words were spoken imputing unchastity to a woman, and by reason thereof she was excluded from a private society and congregation of a sect of Protestant Dissenters, of which she had been a member, and was prevented from obtaining a certificate, without which she could not become a member of any other society of the same nature : Held, that such a result was not such special damage as would render the

words actionable (*Roberts v. Roberts*, 33 *L. J.*, *Q. B.* 249; and see *Chamberlain v. Boyd*, 11 *Q. B. D.* 407).

(2) Action by husband and wife for slander, imputing incontinency to the wife, alleging that by reason thereof the wife became ill and unable to attend to her necessary affairs and business, and that the husband was put to expense in endeavouring to cure her: Held, that the declaration showed no cause of action (*Allsopp v. Allsopp*, 5 *Hurl. & Norm.* 534).

(3) Where the wife, in consequence of words imputing want of chastity to her, ceased to receive the hospitality of divers friends, and especially of her husband, it was held that such a loss was the reasonable and natural consequence of such slander (*Davies v. Solomon*, *L. R.*, 7 *Q. B.* 112; 41 *L. J.*, *Q. B.* 10). It is, however, difficult, on grounds of common sense, to distinguish such damage from the damage referred to in examples 1 and 2.

(4) An action brought by a trader, alleging that defendant falsely and maliciously spoke and published of his wife, who assisted him in his business, certain words accusing her of having committed adultery upon the premises where he resided and carried on his business, whereby he was injured in his business, and certain specified and other persons who had previously dealt with him, ceased to do so, is maintainable on the ground that the injury to his business is the natural consequence of the words spoken: held, also, that the special damage might be proved by general evidence of the falling off of

his business, without showing who the persons were who had ceased to deal with him, or that they were the persons to whom the statements were made (*Riding v. Smith*, 1 *Ex. Div.* 91 ; 24 *W. R.* 487).

There is a custom in the City of London Courts enabling a woman whose chastity had been slandered, to maintain an action, though she can prove no special damage.

(5) **Examples of damage implied from imputation of crime.**—Thus the words, “You are a rogue, and I will prove you a rogue, for you forged my name,” are actionable (*Jones v. Herne*, 2 *Wils.* 89). And it is immaterial that the charge was made at a time when it could not cause any criminal proceedings to be instituted. Thus the words “You are guilty” [innuendo of the murder of D.] are, after the verdict of not guilty, a sufficient charge of murder to support an action (*Peake v. Oldham*, *W. Bl.* 960). But if words charging a crime are accompanied by an express allusion to a transaction which merely amounts to a civil injury, as breach of trust or contract, they are not actionable (per *Ellenborough* in *Thompson v. Barnard*, 1 *Camp.* 48 ; and per *Kenyon*, *Christie v. Cowell*, *Peake*, 4).

(6) The allegation, too, must be a direct charge of indictable crime (*Lemon v. Simmons*, 57 *L. J.*, *Q. B.* 260). Thus saying of another that he had forsworn himself is not actionable, without showing that the words had reference to some judicial inquiry (*Holt v. Scholefield*, 6 *T. R.* 691). So where a declaration alleged that the defendant called the plaintiff a “welcher” (meaning a person who dishonestly appro-

prises and embezzles money deposited with him)"; and the evidence showed that a "welcher" is a person who receives money which has been deposited to abide the event of a race, and who has a pre-determined intention to keep the money for himself, it was held that, as the word did not necessarily impute the offence of embezzlement, it did not imply an indictable offence, and so was not actionable (*Blackman v. Bryant*, 27 L. T. 491, *Ex.*).

(7) **Examples of damage implied from imputation of unfitness for society.**—Thus to allege the *present* possession of an infectious, or even a venereal, disease is actionable, but a charge of past infection is not; for it shows no present unfitness for society (see *Carslake v. Mappedrum*, 2 T. R. 473; *Bloodworth v. Gray*, 7 M. & G. 334). Yet, with curious inconsistency, our law gives no relief to a woman who is falsely accused of fornication, unless actual exclusion from general society be specifically proved (see page 132, *sup.*).

(8) **Examples of damage implied from imputation of unfitness for business.**—Words imputing drunkenness to a master mariner whilst in command of a ship at sea are actionable *per se* (*Irwin v. Brandwood*, 2 H. & C. 960; 33 L. J., *Ex.* 257).

(9) So where a clergyman is beneficed or holds some ecclesiastical office, a charge of incontinence is actionable; but it is not so if he holds no ecclesiastical office (*Gallway v. Marshall*, 23 L. J., *Ex.* 78).

(10) The American courts have held that to say of a magistrate "he is a damned fool of a justice,"

is actionable *per se* (*Spiering v. Andrea*, 18 *Am. Law Reg. (N. S.)* 186, 188, n.).

(11) So to say of a surgeon "he is a bad character; none of the men here will meet him," is actionable (*Southee v. Denning*, 17 *L. J., Ex.* 151; 1 *Ex.* 196). Or of an attorney that "he deserves to be struck off the roll" (*Phillips v. Jansen*, 2 *Esp.* 624). But it is not ground for an action to say "he has defrauded his creditors, and been horsewhipped off the course at Doncaster," because this has no reference to his profession (see also *Jenner v. A'Beckett*, *L. R.*, 7 *Q. B.* 11; 41 *L. J., Q. B.* 14; and *Miller v. David*, *L. R.*, 9 *C. P.* 118). But this seems a curious refinement.

ART. 47.—*Repeating Libel or Slander.*

Whenever an action will lie for slander or libel, it is of no consequence that the defendant was not the originator, but merely a repeater, or printer and publisher of it; and if the damage arise simply from the repetition, the originator will not be liable (*Parkins v. Scott*, 1 *Hurl. & Coll.* 153; *Watkin v. Hall*, *L. R.*, 3 *Q. B.* 396); except (1) where the originator had authorized the repetition (*Kendillon v. Maltby*, *Car. & M.* 402); and (2) where the words are spoken to a person under a moral duty or obligation to com-

municate them to a third person (*Derry v. Handley*, 16 L. T., N. S., 263).

(1) In that case, Cockburn, C. J., observes, "Where an actual duty is cast upon the person to whom the slander is uttered to communicate what he has heard to some third person, as when a communication is made to a husband, such as, if true, would render the person the subject of it unfit to associate with his wife and daughters, the slanderer cannot excuse himself by saying, 'True, I told the husband, but I never intended that he should carry the matter to his wife.' In such case the communication is privileged, and an exception to the rule to which I have referred; and the originator of the slander, and not the bearer of it, is responsible for the consequences."

(2) But where A. slandered B. in C.'s hearing, and C., without authority, repeated the slander to D., *per quod* D. refused to trust B.: it was held that no action lay against A., the original utterer, as the damage was the result of C.'s unauthorized repetition and not of the original statement (*Ward v. Weeks*, 4 M. & P. 808).

(3) **Printing slander.**—So the printing and publishing by a third party of oral slander (not *per se* actionable), renders the person who prints, or writes and publishes the slander, and all aiding or assisting him, liable to an action, although the originator, who merely *spoke* the slander, will not be liable (*McGregor v. Thwaites*, 3 B. & C. 35).

(4) Upon this principle the publisher, as well as the author of a libel, is liable; and the former cannot

exonerate himself by naming the latter. For "of what use is it to send the name of the author with a libel that is to pass into a part of the country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character whether he is a person entitled to credit for veracity or not" (per Best, J., *Crespigny v. Wellesley*, 5 Bing. 403).

ART. 48.—*Libels by Newspaper Proprietors.*

(1) In an action for libel against the proprietor or editor of any newspaper or other periodical, the defendant may plead that the libel was inserted without malice and without gross negligence; and that at the earliest subsequent opportunity he inserted in such or some other publication a full apology; or, if such publication was published at intervals exceeding a month, that he offered to publish such apology in any paper the plaintiff might name. And upon filing such plea, the defendant may pay a sum into court by way of amends (6 & 7 Vict. c. 96, s. 2). See *Hawkesley v. Bradshawe*, 5 Q. B. D. 22.

(2) In any such action as aforesaid the defendant shall be at liberty to give in evidence, in mitigation of damages, that the plaintiff has already recovered or brought

actions for damages, or has received or agreed to receive compensation in respect of a libel or libels to the same purport or effect (51 & 52 *Vict. c. 64 s. 6*)(a).

ART. 49.—*Limitation of Actions for Defamation.*

An action for slander must be commenced within two years next after the cause of action arose, and an action for libel within six years.

Section II.

OF MALICIOUS PROSECUTION.

ART. 50.—*Definition.*

(1) Malicious prosecution consists in the malicious institution against another of unsuccessful criminal, or bankruptcy, or liquidation proceedings, without reasonable or probable cause (see *Churchill v. Siggers*, 3 *Ell.*

(a) As to the consolidation of several actions brought against different persons for the same libel, see 51 & 52 *Vict. c. 64, s. 5.*

& Bl. 937; *Johnson v. Emerson*, L. R., 6 Ex. 329; and *Quartz Hill, &c. Co. v. Eyre*, 11 Q. B. D. 674).

(2) Malicious prosecution causing actual damage to the party prosecuted is a tort, for which he may maintain an action.

It will be seen from the above article, that in order to sustain an action for malicious prosecution, five factors must co-exist, viz.:—(1) a prosecution of the plaintiff by the defendant; (2) want of reasonable and probable cause for that prosecution; (3) malice, express or implied; (4) the determination of the prosecution in favour of the party prosecuted; and (5) loss or damage caused to that party by the prosecution. If any one of these five factors are absent, no action will lie. It is, therefore, desirable to examine each one of these elements in detail.

ART. 51.—*Prosecution by the Defendant.*

The prosecution must have been instituted by the defendant against the plaintiff, and not merely by the authorities on facts furnished by the defendant.

Thus, if a person *bonâ fide* lays before a magistrate a state of facts, without making a specific charge of crime, and the magistrate erroneously treats the matter as a felony, when it is in reality only a civil

injury, and issues his warrant for the apprehension of the plaintiff, the defendant who has complained to the magistrate is not responsible for the mistake. For *he* has not instituted the prosecution, but the magistrate (*Wyatt v. White*, 29 *L. J.*, *Ex.* 193; *Cooper v. Booth*, 3 *Esp.* 144).

ART. 52.—*Want of Reasonable and Probable Cause.*

(1) The onus of proving the absence of reasonable and probable cause for the prosecution rests on the plaintiff (*Lister v. Perryman*, *L. R.*, 4 *H. L.* 521; *Abrath v. N. E. R. Co.*, 11 *App. Cas.* 247).

(2) The jury find the facts on which the question of reasonable and probable cause depends; but the judge determines whether those facts do constitute reasonable and probable cause.

(3) No definite rule can be laid down for the exercise of the judge's judgment (*Lister v. Perryman*, *L. R.*, 4 *H. L.* 521); but the defendants will be deemed to have had reasonable and probable cause for a prosecution where (a) they took reasonable care to inform themselves of the true facts; (b) they honestly, although erroneously, believed in their information; and (c) that information;

if true, would have afforded a *prima facie* case for the prosecution complained of (see *Abrath v. N. E. R. Co.*, *ubi sup.*).

(1) In the case of *Lister v. Perryman* (*ubi sup.*), Lord Chelmsford said: "There can be no doubt since the case of *Panton v. Williams* (2 Q. B. 169), in which the question was solemnly decided in the Exchequer Chamber, that what is reasonable and probable cause in an action for malicious prosecution, or for false imprisonment, is to be determined by the judge. In what other sense it is properly called a question of law, I am at a loss to understand. No definite rule can be laid down for the exercise of the judge's judgment. Each case must depend on its own circumstances, and the result is a conclusion drawn by each judge for himself, whether the facts found by the jury, in his opinion, constitute a defence to the action. The verdict in cases of this description, therefore, is only nominally the verdict of a jury."

(2) In *Broad v. Ham* (5 Bing. N. C. 725), Tindal, C. J., said: "There must be a reasonable cause, such as would operate on the mind of a discreet man; there must be also a probable cause, such as would operate on the mind of a reasonable man; at all events, such as would operate on the mind of the party making the charge, otherwise there is no probable cause for him."

(3) A man who makes a criminal charge against another, cannot absolve himself from considering whether the charge is reasonable and probable, by

delegating that question to an agent, even although that agent be presumably more capable of judging. Thus, the opinion of counsel as to the propriety of instituting a prosecution, will not excuse the defendant if the charge was in fact unreasonable and improbable. For as Heath, J., said in *Hewlett v. Cruchley* (5 Taunt. 283), "it would be a most pernicious practice if we were to introduce the principle that a man, by obtaining the opinion of counsel, by applying to a weak man, or an ignorant man, might shelter his malice in bringing an unfounded prosecution."

(4) With regard to the amount of care which a prosecutor is bound to exercise before instituting a prosecution, it would seem that although he must not act upon mere tittle tattle or rumour, or even upon what one man has told his immediate informant, without himself interviewing the first-mentioned man, yet where his immediate informant is himself cognizant of other facts, which, if true, strongly confirm the hearsay evidence, that will be sufficient to justify the prosecutor in acting, without first going to the source of the hearsay (*Lister v. Perryman*, L. R., 4 H. L. 521). But as circumstances are infinite in variety, it is quite impossible to lay down any guiding principle as to what steps a person ought reasonably to take for informing himself of the truth before instituting a prosecution.

ART. 53.—*Malice.*

(1) In an action of malicious prosecution, malice is generally implied, upon proof of absence of reasonable and probable cause for instituting the prosecution complained of (*Johnstone v. Sutton*, 1 T. R. 544).

(2) A prosecution, though in the outset unmalicious, may become malicious, if the prosecutor, having acquired positive knowledge of the innocence of the accused, proceeds *malo animo* in the prosecution (Per Cockburn, C. J., *Fitz John v. McKinder*, 30 L. J., C. P. 264).

(3) And where a person has not instituted, but only adopts and continues proceedings, the same principle applies (*Weston v. Beeman*, 27 L. J., Ex. 57).

(1) Thus, where the defendant, at the time of the prosecution of the plaintiff, showed that he had a consciousness of the innocence of the accused, it was held evidence of malice (see *Shrosbery v. Osmaston*, 37 L. T. 792).

(2) So, too, where one is assaulted justifiably, and institutes criminal proceedings for the assault; if in the opinion of the jury, he commenced such proceedings, knowing that he was wrong and had no just cause of complaint, malice may be presumed (*Hinton v. Heather*, 14 M. & W. 131).

(3) So, too, it may be presumed, if it be shown that the defendant *knew* that the plaintiff against whom he had charged a theft, took the goods under an erroneous belief that he had a legal right to do so (*Huntley v. Simpson*, 27 *L. J.*, *Ex.* 134).

(4) So, where the prosecutor of another says that he is prosecuting him in order to stop his mouth, it is evidence that he knew him to be innocent, and therefore that the prosecution was malicious (*Heslop v. Chapman*, per Maule, J., 23 *L. J.*, *Q. B.* 49).

(5) Whether malice may be implied in a corporation, having regard to its want of individuality, is not free from doubt. In *Edwards v. Mid. R. Co.* (6 *Q. B. D.* 287), it was held by Fry, J., that a corporation was capable of malice. On the other hand, in *Abrath v. N. E. R. Co.* (11 *App. Cas.* 247), Lord Bramwell strongly supported the opposite view, but this was only a dictum, and not necessary to the determination of the case; and if a virtuous master is liable for the malice of his servant, it is difficult to see why an impersonal corporation should not be.

(6) Where, through the defendant's perjury, the judge of the county court, believing the *plaintiff* to have perjured himself, committed him for trial, and bound over the defendant to prosecute him, which he did, but unsuccessfully; it was held that the plaintiff had a good cause of action against the defendant; because, although the defendant had not initiated the proceedings, yet he might have discharged his recognizance by appearing and telling the truth (*Fitz John v. MacKinder*, 30 *L. J.*, *C. P.* 264).

ART. 54.—*Failure of the Prosecution.*

It is necessary to show that the proceeding alleged to have been instituted maliciously, and without reasonable or probable cause, has terminated in favour of the plaintiff, if, from its nature, it be capable of such a termination (*Basèbè v. Matthews, L. R., 2 C. P. 684*).

This rule, which at first sight appears somewhat harsh, is founded on good sense, and applies even where the result of the prosecution cannot be appealed (*Basèbè v. Matthews, ubi sup.*). As Compton, J., said in *Castrique v. Behrens*, 30 *L. J., Q. B.* 168, "there is no doubt on principle and on the authorities, that an action lies for maliciously, and without reasonable and probable cause, setting the law of this country in motion, to the damage of the plaintiff. . . . But in such an action it is essential to show that the proceeding alleged to be instituted maliciously, and without probable cause, has terminated in favour of the plaintiff, if from its nature it be capable of such termination. The reason seems to be that, if in the proceeding complained of, the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause."

ART. 55.—*Damage.*

In order to support an action for malicious prosecution, it is necessary to show some damage resulting to the plaintiff from the prosecution complained of (*Byne v. Moore*, 5 *Taunt.* 187).

The damage need not necessarily be pecuniary. "It may be either the damage to a man's fame, as if the matter he is accused of be scandalous, or where he has been put in danger to lose his life, or limb, or liberty; or damage to his property, as where he is obliged to spend money in necessary charges to acquit himself of the crime of which he is accused" (*Mayne's Treatise on Damages*, p. 345).

In this case, as in slander, the damages must be the reasonable and probable result of the malicious prosecution, and not too remote.

N.B.—There are certain torts analogous to malicious prosecution which occur too rarely to require notice in an elementary work of this kind. One of these is malicious arrest, which consists in wilfully putting the law in motion to effect the arrest of another *under civil process* without cause. Arrest under civil process is, however, now so rarely possible that this form of tort may be almost deemed obsolete. Another wrong of the same nature is causing injury to another by an abuse of legal procedure (see *Grainger v. Hill*, 4 *Bing. N. C.* 212). This, again, is rarely brought before the courts, and the student who desires information regarding it is referred to larger works.

Section III.

OF MAINTENANCE.

ART. 56.—*Definition.*

(1) Maintenance is a malicious assistance, by money or otherwise, proffered by a third person to either party to a suit, to enable him to prosecute or defend it.

(2) Malice is implied on proof of officious assistance; but it may be rebutted by showing (a) that the maintainer had a common interest in the action with the party maintained; or (b) that the maintainer was actuated by motives of charity; *bonâ fide* believing that the person maintained was a poor man oppressed by a rich one.

(1) Thus, in the well-known case of *Bradlaugh v. Newdegate* (11 Q. B. D. 1), the plaintiff, having sat and voted as a member of Parliament without having made and subscribed the oath, the defendant, who was also a member of Parliament, procured C. to sue the plaintiff for the penalty imposed for so sitting and voting. C. was a person of insufficient means to pay the costs in the event of the action being unsuccessful: Held, that the defendant and C. had no common interest in the result of the action for the

penalty, and that the conduct of the defendant in respect of such action amounted to maintenance, for which he was liable to be sued by the plaintiff.

(2) But, on the other hand, as a general rule, there is no doubt, that where there is a common interest believed on reasonable grounds to exist, maintenance, under those circumstances, would be justifiable. The oldest authorities all lay down this qualification, and, by the instances they give, show the sort of interest which is intended. A master for a servant, or a servant for a master, an heir, a brother, a son-in-law, a brother-in-law, a fellow commoner defending rights of common, or a landlord defending his tenant in a suit for tithes (per Lord Coleridge, C. J., in *Bradlaugh v. Newdegate*, 11 Q. B. D. 11).

(3) And, again, in *Plating Company v. Farquharson* (17 Ch. D. 49), it was held, that all persons engaged in the trade of plating, had such a common interest in impugning the validity of a patent granted to a person for nickel plating, that they were entitled to subscribe a fund for enabling the defendant, in an action brought by the patentee for infringement of his patent, to appeal against an adverse judgment.

(4) And so where a rich man in the *bond fide*, but erroneous, belief that a poor man was being oppressed, advanced money to him for the purpose of maintaining an action against the oppressor, it was held that he was justified, notwithstanding that if he had made full inquiry, he would have ascertained that there was no reasonable or probable ground for the proceedings which he assisted (*Harris v. Brisco*, 17 Q. B. D. 504). It is on the authority of this case

that this form of tort is classed under torts founded on malice (see also *Findon v. Parker*, 11 *M. & W.* 675; *Hutley v. Hutley*, *L. R.*, 8 *Q. B.* 112; and *Met. Bank v. Pooley*, 10 *App. Cas.* 210).

Section IV.

OF SEDUCTION.

ART. 57.—*General Liability.*

Every person is liable to an action who wilfully does any of the following acts:—

- (1) Procures a servant to depart from the master's service during the stipulated period of service, or a child to depart from that service while it exists.
- (2) Harbours a servant, after wrongfully quitting the master.
- (3) Debauches such servant or child so as to incapacitate them from rendering such service (*Lumley v. Gye*, 2 *Ell. & Bl.* 224; *Blake v. Lanyon*, 2 *T. R.* 221).

Thus, if I employed (against the will of his master) an apprentice or servant before the expiration of his term of service, I should be liable, for by so doing I

should be affording him the means of keeping out of his master's service.

This class of tort most usually comes before the court under the circumstances referred to in paragraph 3 of the above article, viz., where an action is brought (generally by an aggrieved parent) to recover damages from one who has seduced a daughter or female servant, from the paths of virtue, and consequently this section will be devoted to a consideration of that particular class of wrong.

ART. 58.—*Relation of Master and Servant essential.*

(1) The relation of master and servant must exist at the time of the seduction (*Davies v. Williams*, 10 Q. B. 725); and it would appear also that the confinement, or illness, of the girl must have happened while she was in the plaintiff's service.

(2) But a contract of service may be *implied* from the relation between the plaintiff and the alleged servant; and where a daughter is seduced very slight services will suffice to raise this implication.

(1) Thus, the plaintiff's daughter was in service as a governess, and was seduced by the defendant whilst on a three-days' visit, with her employer's permission, to the plaintiff her widowed mother. During her visit she gave some assistance in household duties. At the time of her confinement she was in the service

of another employer, and afterwards returned home to her mother: Held, that there was no evidence of service at the time of the seduction. And also, by Kelly, C. B., and Martin and Bramwell, BB., that the action must also fail on the ground that *the confinement* did not take place whilst the daughter was in the plaintiff's service (*Hedges v. Tagg*, L. R., 7 Ex. 283).

(2) In *Long v. Keightley*, however (11 Ir. Rep., C. L. 221, C. P.), there was held to be a sufficient loss of service under the following circumstances. The plaintiff's daughter, aged twenty-four years, was seduced in the house and service of the plaintiff. The day after, she left Ireland for America, pursuant to a prior arrangement. Finding herself pregnant while in service there, she returned to her native country, and went to stay at her sister's house, where she was confined. Afterwards she returned to the house of her mother (the plaintiff). On the authority of *Hedges v. Tagg*, it was argued, that inasmuch as the confinement did not take place while the daughter was in the service of her mother, the action must fail. But the court distinguished the two cases on the ground, that in *Hedges v. Tagg* the girl's confinement happened when she was in the service of another; while in the case in discussion she was *constructively* in the service of the plaintiff directly she returned to Ireland (and see *Terry v. Hutchinson*, *infra*).

(3) In *Evans v. Walton* (L. R., 2 C. P. 615), the daughter of the plaintiff (a publican), who lived with him and acted as his barmaid, but without any express

contract or wages, was induced by the defendant to leave her father's house: it was held, that the relation of master and servant might be implied from these circumstances, and that it matters not whether the service is at will or for a fixed period.

(4) So such small services as milking, or even making tea, have been held sufficient (*Bennett v. Allcott*, 2 T. R. 166; *Carr v. Clark*, 2 Chit. R. 261).

(5) Where the daughter lived at, and assisted in the duties of the house, from six in the evening until seven in the morning, and the rest of the day was employed elsewhere, it was held sufficient evidence of service (*Rist v. Taux*, 32 L. J., Q. B. 387). And where the daughter is a *minor*, living with her father, service will be presumed (*Harris v. Butler*, 2 M. & W. 542).

(6) But where the daughter at the time of the seduction is acting as housekeeper to another person, the action will not lie (*Dean v. Peel*, 5 East, 45); not even when she partly supports her father (*Manley v. Field*, 29 L. J., C. P. 79).

(7) The plaintiff's daughter, being under age, left his house and went into service. After nearly a month, the master dismissed her at a day's notice, and the next day, on her way home, the defendant seduced her. It was held, that as soon as the real service was put an end to by the master, whether rightfully or wrongfully, the girl intending to return home, the right of her father to her services revived, and there was, therefore, sufficient evidence of service to maintain an action for the seduction (*Terry v. Hutchinson*, L. R., 3 Q. B. 599).

(8) When the child is only absent from her father's house on a temporary visit, there is no termination of her services, providing she still continues, in point of fact, one of his own household (*Griffiths v. Teetjen*, 15 C. B. 344).

ART. 59.—*Misconduct of Parent.*

If a parent has introduced his daughter to, or has encouraged, profligate or improper persons, or has otherwise courted his own injury, he has no ground of action if she be seduced.

Thus, where the defendant was received as the daughter's suitor, and it was afterwards discovered by the plaintiff that he was a married man, notwithstanding which, he allowed the defendant to continue to pay his addresses to his daughter on the assurance that the wife was dying, and the defendant seduced the daughter: it was held, that the plaintiff had brought about his own injury, and had no ground of action (*Reddie v. Scoolt*, 1 Peake, 316).

ART. 60.—*Damages.*

- (1) In cases of seduction, in addition to the actual damage sustained, and any expenses incurred through a servant's or daughter's illness, damages may be given for the loss which the plaintiff

has sustained of the society and comfort of a child who has been seduced, and for the dishonour he has received and the anxiety and distress which he has suffered (*Bedford v. McKowl*, 3 *Esp.* 120 ; *Terry v. Hutchinson*, *L. R.*, 3 *Q. B.* 599).

- (2) Where more than ordinarily base methods have been employed by the seducer, the damages may be aggravated. On the other hand, the defendant may show the loose character of the daughter in mitigation of damages.

(1) Thus, as was observed by Lord Eldon, in *Bedford v. McKowl* (3 *Esp.* 120), "although in point of form the action only purports to give a recompense for loss of service, we cannot shut our eyes to the fact that it is an action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example." Damages given by a jury for this kind of tort, will, therefore, rarely be reduced by the Court on the ground that they are excessive.

(2) *A fortiori* will this be the case, where the seducer has made his advances under the guise of matrimony. As was said by Wilmot, C. J., in a case of that character: "If the party seduced brings an action for breach of promise of marriage (a), so much the better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly treated the defendant, and permitted him to pay his addresses to his daughter" (*Tullidge v. Wade*, 3 Wils. 18.)

(3) On the other hand, the defendant may, in mitigation of damages, call witnesses to prove that they have had sexual intercourse with the girl previously to the seduction (*Eager v. Grimwood*, 16 L. J., Ex. 236; *Verry v. Watkins*, 7 C. & P. 308). And, generally, the previous loose or immoral character of the party-seduced is ground for mitigation. The using of immodest language, for instance, or submitting herself to the defendant under circumstances of extreme indelicacy.

ART. 61.—*Limitation.*

An action for seduction must be commenced within six years (see 21 Jac. 1, c. 16, s. 3).

(a) The loss caused to the plaintiff by breach of a promise to marry, however, is not to be taken into consideration, for that is a civil injury to *her* and not to the father.

Section V.

OF DECEIT OR FRAUD.

ART. 62.—*Definition of Fraud.*

Fraud consists of either :—

- (1) A false statement made with intent to induce another to act upon it, and either known to be false to the party making it, or as to the truth of which he was ignorant, and which he had no reasonable ground for believing to be true; or
- (2) An industrious concealment of a material fact with intent to induce another to act to his detriment; or
- (3) Silence as to a material fact where the essence of a transaction is a confidence that all material facts will be disclosed.

Whether moral delinquency necessary.—After considerable diversity of opinion, it appears to be now well settled, that in order to make a person liable for damages in a common law action of deceit, some amount of moral delinquency is necessary. Possibly, it was put too high by Mr. Justice A. L. Smith, in *Joliffe v. Baker* (11 Q. B. D. 274), when he said that “an action for damages for deceit cannot be main-

tained, unless the plaintiff establishes that the defendant has made a statement false in fact and *fraudulent in intent*," unless his lordship meant that the fraudulent intent might be a presumption of law as distinguished from an actual fact. Indeed, the same learned judge went on to explain that "a statement false in fact, with regard to the truth or falsity of which the defendant *knows himself* to be entirely ignorant, and which he makes for the purpose of receiving some advantage to himself or causing some loss to the plaintiff, is fraudulent in intent; for he thereby lies about his state of knowledge" (and see also Bramwell, L. J., in *Weir v. Bell*, 3 *Ex. D.* 243).

There can be no doubt whatever, that where either a man lies directly, or indirectly by stating as a fact that which he knows he has no reasonable ground for believing to be true, that constitutes fraud (see per Maule, J., *Evans v. Edmunds*, 13 *C. B.* 786; Parke, B., *Taylor v. Ashton*, 11 *M. & W.* 401; and Sir J. Hannen, *Peek v. Derry*, 37 *Ch. D.* 578). It appears, however, that a person making a false statement with intent to induce another to act upon it may be liable even although there was no intent to deceive. As the late Sir Geo. Jessel put it in *Smith v. Chadwick* (20 *Ch. D.* 44), in a passage quoted with approval by Sir J. Hannen, in *Peek v. Derry* (37 *Ch. D.* 582), "A man may issue a prospectus, or make any other statement to induce another to enter into a contract believing that his statement is true, and not intending to deceive; but he may through carelessness have made statements which are not true, and *which he ought to have known were not*

true, and if he does so, he is liable in an action for deceit; he cannot be allowed to escape merely because he had good intentions, and did not intend to defraud.

In the above-mentioned case of *Peek v. Derry*, Sir James Hannen in the course of his judgment, remarked, "No doubt the word 'fraud' is, in common parlance, reserved for actions of great turpitude, but the law applies it to lesser breaches of moral duty; and it appears to me the making of any statement upon which others are intending to act, without reasonable ground for making it, without reasonable ground for believing it to be true, is a breach of moral duty, although it may not be one of such dark complexion as to blast the character of the man for ever who does it. It is not necessary that there should be that amount of wrong in order to give a legal remedy."

"At the same time," as was remarked in the same case by Lord Justice Lopes, "I know of no fraud which will support an action of deceit to which some moral delinquency does not belong. An action for deceit will not lie for an innocent misrepresentation, for such representation is not fraudulent. On the other hand, a slight degree of what I will call moral obliquity will suffice to render a misrepresentation fraudulent in contemplation of law. . . . I think the result of the cases amounts to this—If a person makes to another a material and definite statement of fact which is false, intending that person to rely upon it, and he does rely upon it and is thereby damaged, then the person making the statement is liable to

make compensation to the person to whom it is made—first, if it is false to the knowledge of the person making it; secondly, if it is untrue in fact and not believed to be true by the person making it; thirdly, if it is untrue in fact, and is made recklessly, for instance, without any knowledge on the subject and without taking any trouble to ascertain if it is true or false; fourthly, if it is untrue in fact but believed to be true, but without any reasonable grounds for such belief.”

In the same case Lord Justice Cotton said: “Although, in my opinion, it is not necessary that there should be what I should call fraud, yet in these actions, according to my view of the law, there must be a departure from duty; and in my opinion when a man makes an untrue statement with an intention that it shall be acted upon, without any reasonable ground for believing that statement to be true, he makes default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statement have to have true statements only made to them. And I should say that when a man makes a false statement to induce others to act upon it, without reasonable ground to suppose it to be true, and without taking care to ascertain whether it is true, he is liable civilly, as much as a person who commits what is usually called fraud, and tells an untruth knowing it to be an untruth” (and see also *Cann v. Wilson*, 39 Ch. D. 39).

It will be seen from the authorities above quoted that all are agreed (1) that there must be a false

statement; and (2) that it must be made with intent to induce another to act upon it. For if it were otherwise, a man might sue his neighbour for any mode of communicating erroneous information; such, for example, as having a conspicuous clock too slow, since the plaintiff might thereby be prevented from attending to some duty, or acquiring some benefit (*Bailey v. Walford*, 9 Q. B. 197, 208). Where the authorities speak with a somewhat uncertain sound, is whether it is necessary that the party making the statement must have lied directly or indirectly as to his state of knowledge, or whether it is sufficient that he made an unreasonable mistake (see also *Reese River Co. v. Smith*, L. R., 4 H. L. 79; *Peck v. Gurney*, L. R., 6 H. L. 377; *Evans v. Edmunds*, 13 C. B. 777; *Taylor v. Ashton*, 11 M. & W. 401; *Charlton v. Hay*, 32 L. T. 96; *Kennedy v. Panama, &c. Co.*, L. R., 2 Q. B. 580.)

It will be perceived from the definition that fraud may be either positive or negative; in other words, it may consist of a positive statement, or an equally deceptive suppression. It is desirable to treat these two classes separately.

ART. 63.—*When an Action will lie for fraudulent Statements.*

(1) An action will lie, where, by reason of a fraudulent representation made by the defendant:—

(a) The person to whom it was made has

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been induced to act to his loss (*Pasley v. Freeman*, 2 Sm. L. C. 71); or

- (b) A third person has been so induced, if the representation was made with the direct intention that he should so act. (*Langridge v. Levy*, 2 M. & W. 519.)

(2) Provided that where the fraudulent statement consists of a false representation as to the conduct, credit, ability or dealings of another, with intent to procure for him credit, money or goods, no action will lie unless the representation is in writing signed by the defendant (a) (9 Geo. 4, c. 14, s. 6).

Elements of an action of deceit.—As Lord Selborne said, in *Smith v. Chadwick* (9 App. Cas. 190): “I conceive that in an action of deceit it is the duty of the plaintiff to establish two things; first, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; and secondly, he must establish that this fraud was an inducing cause

(a) It will be observed that the signature must be that of the defendant himself, and not of an agent or partner (*Swift v. Jewsbury*, L. R., 9 Q. B. 301; *Mason v. Williams*, 28 L. T. N. S. 232).

to the contract; for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct." In short, as was said by Buller, J., in *Pasley v. Freeman* (*ubi sup.*): "Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies."

Illustrations of fraud followed by damage.—(1) Thus, where one fraudulently misrepresents the amount of his business, and the person to whom such representation is made, acting on the faith thereof, purchases it and is damnified, an action of deceit will lie against the vendor (*Dobell v. Stevens*, 3 B. & C. 623; *Smith v. Chadwick*, *ubi sup.*).

(2) Similarly, where a gunmaker sold a gun to B., for the use of C., fraudulently warranting it to be sound, and the gun burst while C. was using it, and he was thereby injured: held, that C. might maintain an action for false representation against the gunmaker (*Langridge v. Lery*, *ubi sup.*).

(3) The Act incorporating a tramway company provided that the carriages might be moved by animal power, and, *with the consent of the Board of Trade*, by steam power. The directors, who expected that they would without difficulty obtain the consent of the Board of Trade, issued a prospectus in which they stated that by their special Act the company *had a right* to use steam power. The plaintiff took shares, and stated in his evidence that he was induced to take them by this statement, and also by his knowledge of and interest in the locality, and his confidence in the character of the directors. The

Board of Trade refused to sanction the use of steam power, and the plaintiff brought an action of deceit against the directors, claiming damages for the misstatement in the prospectus. On these facts it was held that they were liable, and Cotton, L. J., said: "What in my opinion is a correct statement of the law is this—that where a man makes a statement to be acted upon by others, which is false, and which is known by him to be false, or is made by him recklessly or without care whether it is true or false—that is, without any reasonable ground for believing it to be true—he is liable in an action of deceit at the suit of any one to whom it was addressed, and who was materially induced by the misstatement to do an act to his prejudice." His Lordship then went into the facts, and came to the conclusion that there was no reasonable ground for making the false statement complained of, for if the directors had looked into the Act—and they must have known it was in the Act—they would have found it clear that they had no right to use steam power unless the consent of the Board of Trade was obtained. His Lordship also came to the conclusion that the prospectus was a material (although not the only) inducement to the plaintiff to take the shares, and stated his opinion that it is not necessary that the fraudulent misrepresentation should be the *only* inducement, so long as it constituted a material factor in the result at which he arrived in considering the advisability of investing in the shares. Accordingly the defendants were held liable.

(4) Though, as above stated, it is now settled that

the defendant, in actions of deceit, must have been guilty of moral delinquency, it has also been held, after much conflict of opinion, that (except as to cases coming under paragraph (2) of the present article) the fraud of the agent, acting within the scope of his employment, is, in law, the fraud of the principal. Thus, a plaintiff, having for some time, on a guarantee of the defendants, supplied J. D., a customer of theirs, with oats, on credit, for carrying out a government contract, refused to continue to do so unless he had a better guarantee. The defendants' manager thereupon gave him a written guarantee to the effect that the customer's cheque on the bank in plaintiff's favour, in payment of the oats supplied, should be paid on receipt of the government money in priority to any other payment "except to this bank." J. D. was then indebted to the bank to the amount of 12,000*l.*, but this fact was not known to the plaintiff, nor was it communicated to him by the manager. The plaintiff, thereupon, supplied the oats to the value of 1,227*l.* The government money, amounting to 2,676*l.*, was received by J. D. and paid into the bank; but J. D.'s cheque for the price of oats drawn on the bank in favour of the plaintiff was dishonoured by the defendants, who claimed to detain the whole sum of 2,676*l.* in payment of J. D.'s debt to them. The plaintiff having brought an action for false representation: Held, first, that there was evidence to go to the jury that the manager knew and intended that the guarantee should be unavailing, and fraudulently concealed from the plaintiff the fact which would make it so; secondly, that the defen-

dants would be liable for such fraud (*Barwick v. English Joint-Stock Bank, L. R., 2 Ex. 259*).

(5) An officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to A., which, by omitting a material fact, misled A., and induced him to accept a bill in which the bank was interested, and A. was compelled to pay the bill: Held, that A. could recover from the bank the amount so paid. In an action of deceit, whether against a person or against a company, the fraud of the agent may be treated, for the purposes of pleading, as that of the principal (*Mackay v. Commercial Bank of New Brunswick, L. R., 5 P. C. 394*. See, also, *Addis v. Western Bank of Scotland, L. R., 1 H. L. 145*, and the recent case of *Houldsworth v. City of Glasgow Bank and Liquidators, 5 App. Ca. 317*). A principal agent is not however responsible for the false representation of a sub-agent made on behalf of his principal. For instance, *the directors* of a limited company are not personally responsible for the fraudulent representation of an agent of the company, unless such representation was made by their inducement or authority (*Bear v. Stevenson, 30 L. T. 177*).

(6) Of course where an agent makes a fraudulent statement outside the general scope of his employment, the principal will not be liable. For instance, where the secretary of a company by false statements induced persons to take shares, it was held that the

company was not liable; for it is no part of the duty of a secretary of a company to make representations to persons to induce them to become shareholders (*Newlands v. Nat. Employers Acc. Ass. Co.*, 54 L. J., Q. B. 428).

And *à fortiori* will this be the case where a secretary makes the fraudulent statements for his own benefit (*British, &c. Banking Co. v. Charnwood, &c. Ry. Co.*, 18 Q. B. D. 714, and *Barnett v. S. London Tramways Co.*, *ib.* 815).

ART. 64.—*When an Action will lie for fraudulent Silence.*

The general rule, both of law and equity, is, that mere silence with regard to a material fact will not give a right of action,

- (a) unless active artificial means have been taken to prevent the other party from discovering the fact for himself; or
- (b) unless the essence of the transaction implied confidence reposed in the party concealing, to divulge all material facts.

(1) Thus, in the case of a sale, although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold (since that would amount to a positive fraud on the vendee), yet, under the general doctrine of *caveat emptor*, he is not ordinarily bound to disclose every defect of

which he may be cognisant, although his silence may operate virtually to deceive the vendee (see *Story on Contracts*, p. 511, cited with approval in *Ward v. Hobbs*, 4 *App. Cas.*, p. 26; see also *Fletcher v. Snell*, 42 *L. J.*, *Q. B.* 55).

(2) Thus, the defendant sent for sale, to a public market, pigs which he knew to be infected with a contagious disease. They were exposed for sale subject to a condition that no warranty would be given and no compensation would be made in respect of any fault. No verbal representation was made by or on behalf of the defendant as to the condition of the pigs. The plaintiff having bought the pigs, put them with other pigs which became infected. Some of the pigs bought from the defendant, and also some of those with which they were put, died of the contagious disease: Held, that the defendant was not liable for the loss sustained by the plaintiff, for that his conduct in exposing the pigs for sale in the market did not amount to a representation that they were free from disease (*Ward v. Hobbs*, *sup.*). "The mere fact," said Brett, L. J., when that case was before the Court of Appeal (3 *Q. B. D.* 162), "of offering a defective chattel for sale, where nothing is said about quality and condition, and nothing is done to conceal the defect, gives no cause of action, though the seller knows of the defect, and he knows that if the purchaser even suspected him of the knowledge he would not buy."

(3) So, also, in *Peek v. Gurney*, *L. R.*, 6 *H. L.* 403), Lord Cairns remarks: "I entirely agree with what has been stated by my noble and learned friends

before me, that mere silence could not, in my opinion, be a sufficient foundation for this proceeding. Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misrepresentation of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."

(4) "Even if the vendor was aware," observes Lord Blackburn, "that the purchaser thought the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor" (*Smith v. Hughes*, *L. R.*, 6 *C. P.* 597).

(5) On the other hand, where the vendor of a house, knowing of a defect in one of the walls, plastered it up and papered it over, in consequence whereof the vendee was deceived as to its true condition, and was damnified: it was held that the purchaser could maintain an action of deceit (*Pickering v. Dawson*, 4 *Taunt.* 785).

(6) Again, where a ship was to be taken "with all faults," and the vendor knew of a latent defect in her, and, in order to escape its detection, *concealed it* and made a fraudulent representation of her condition: Held, that an action of deceit would lie (*Schneider v. Heath*, 3 Camp. 506). For the expression "all faults" is not equivalent to "all frauds," and there is a vast difference between leaving a man to form his own judgment, and laboriously perverting the facts on which alone a correct judgment can be founded, by taking active means to prevent him learning of their existence. The active concealment of a defect is, in fact, equivalent to a *statement* that it does not exist. A statement is merely a communication from one mind to another, and such a communication may be made as readily and as positively by acts leading to the inference intended to be communicated as by words uttered or reduced into writing.

(7) There are, however, some exceptional cases, in which even silence is a breach of duty, without any active concealment of fact. For instance, where a person is desirous of effecting an insurance on his life, the law casts upon him the duty of divulging everything which he knows about his health and habits which would affect the judgment of the directors of the office in determining whether they will accept or reject the risk. The very essence of such a transaction is confidence reposed by the directors in the candidate for insurance, and it is a gross breach of that confidence, amounting to fraud, if he omits to communicate facts to them which he knows would

influence their judgment, and which they cannot find out by reasonable diligence for themselves.

(8) It is apprehended that the same principle would apply to the case where one gives "a character" in reply to an application from an intending employer, where the suppression of a material fact (*e.g.* drunkenness or immorality) might make a material difference to the decision of the party seeking the character.

ART. 65.—*Limitation.*

An action for deceit must be brought within six years, unless the existence of the fraud was fraudulently concealed by the defendant, in which case the action must be brought within six years after the plaintiff discovers, or might by reasonable diligence have discovered, the fraud (*Gibbs v. Gould*, 9 Q. B. D. 57).

CHAPTER II.

OF TORTS FOUNDED ON NEGLIGENCE.

ART. 66.—*Definition.*

(1) Negligence consists in the omission to do something which a reasonable man would do, or the doing something which a reasonable man would not do (*Blythe v. Birm. Water Co.*, 25 *L. J.*, *Ex.* 212).

(2.) It is a public duty, incumbent upon every one, to abstain from negligence; and any breach of this duty which results in damage to another, is a tort.

General illustrations.—(1) Thus, where the plaintiff was in the occupation of certain farm buildings, and of corn standing in a field adjoining the field of the defendant, and the defendant stacked his hay on the latter, knowing that it was in a highly dangerous state and likely to catch fire, and it subsequently did ignite and set fire to the plaintiff's property, it was held, that the defendant was liable (*Vaughan v. Menlove*, 3 *Bing. N. C.* 468).

(2) So, where the defendant entrusted a loaded

gun to an inexperienced servant girl, with directions to take the priming out, and she pointed and fired it at the plaintiff's son, wounding and injuring him—the defendant was held liable (*Dixon v. Bell*, 5 M. & S. 198).

(3) On the other hand, a water company whose apparatus was constructed with reasonable care, and to withstand ordinary frosts, was held not to be liable for the bursting of the pipes by an extraordinarily severe frost (*Blythe v. B. W. W. Co.*, *sup.*).

(4) And so, where the defendants' line was misplaced by an extraordinary flood, and by such misplacement injury was done to the plaintiff, it was held that no action could be maintained against the defendants (*Withers v. The North Kent R. Co.*, 27 L. J., *Ex.* 417).

(5) Again, a valuable greyhound was delivered by his owner to the servants of a railway company, who were not common carriers of dogs, to be carried; and the fare was demanded and paid. At the time of delivery the greyhound had on a leathern collar, with a strap attached thereto. In the course of the journey, it being necessary to remove the greyhound from one train to another which had not then come up, it was fastened by means of the strap and collar to an iron spout on the open platform of a station, and, while so fastened, it slipped its head, ran on the line, and was killed: Held, that the fastening the greyhound by the means furnished by the owner himself, which at the time appeared to be sufficient, was no evidence of negligence (*Richardson v. N. E. R. Co.*, L. R., 7 C. P. 78).

(6) **Dangerous animals.**—So, if a man *knowingly* keeps dangerous animals, he is answerable for any injury they may commit, and that, too, though he has done his best to secure their safe keeping. In other words, he who keeps an animal of the above description (*May v. Burdett*, 9 Q. B. 101), knowing it to be so, does that which, in the eyes of the Court, a reasonable man would not do (*Cox v. Burbidge*, 13 Com. B., N. S. 430). If the animal is by nature dangerous, no actual knowledge of its previous disposition is necessary, for in that case a man must absolutely guarantee that his precautions are adequate, and he would only be excused if the animal escaped by the malice of a third party or by the act of God; but if the animal is naturally domestic, then actual knowledge (technically called “scienter”) of his fierceness must be proved (*R. v. Huggins*, 2 Ld. Raym. 1583). It is not necessary, in order to sustain an action against a person for negligently keeping a ferocious dog, to show that the animal has actually bitten another person before it bit the plaintiff: it is enough to show that it has, to the knowledge of its owner, evinced a savage disposition, by attempting to bite (*Worth v. Gilling*, L. R., 2 C. P. 685). It has been held that, if the owner of a dog appoints a servant to keep it, the servant’s knowledge of the animal’s disposition is the knowledge of the master, for it is knowledge acquired by him in relation to a matter within the scope of his employment (*Baldwin v. Casella*, L. R., 7 Ex. 325). But where the complaint is made to a servant, who has no control over the defendant’s business, nor of

his yard where his dog was kept, nor of the dog itself, the knowledge of the servant would not necessarily be that of the master (*Stiles v. The Cardiff Steam Navigation Co.*, 33 L. J., Q. B. 310; and see *Applebee v. Percy*, L. R., 9 C. P. 647).

Exception.—By 28 & 29 Vict. c. 60, s. 1, scienter of a dog's disposition, who has injured sheep or cattle, need not be proved. It has been held that horses are to be included under the term *cattle* (*Wright v. Pearson*, L. R., 4 Q. B. 582). Nor is it necessary to show a scienter where the action is founded on the breach of a contract to use reasonable care, and not upon any breach of duty as the owner of a mischievous animal (*Smith v. Cook*, 1 Q. B. D. 79).

(7) For further examples of negligence the student is referred to *Holmes v. Mather*, L. R., 10 Ex. 261; *Firth v. Bowling Iron Co.*, 3 C. P. D. 254; *Harris v. Mobbs*, 3 Ex. D. 268; *Clark v. Chambers*, 3 Q. B. D. 327; *Parry v. Smith*, 4 C. P. D. 325; *White v. France*, 2 C. P. D. 308; *Manzoni v. Douglas*, 6 C. P. D. 145. As to the manner of estimating damages in cases of injuries arising from railway accidents, see the recent case of *Phillips v. L. & S. W. R. Co.*, 5 C. P. D. 280.

From the above rule and illustrations, it will be seen that the term negligence is quite a relative expression (a), and that in deciding whether a given

(a) The student must also distinguish carefully between negligence giving rise to pure torts, and negligence arising out of the performance of contracts. In the latter class of

act is, or is not, negligent, the circumstances attending each particular case must be fully considered. "A man," it has been said, "who traverses a crowded thoroughfare with edged tools, or bars of iron, must take especial care that he does not cut or bruise others with the things he carries. Such person would be bound to keep a better look out than the man who merely carried an umbrella; and the person who carried an umbrella would be bound to take more care in walking with it than a person who had nothing at all in his hands."

ART. 67.—*Contributory Negligence.*

(1) Though negligence, whereby actual damage is caused, is actionable, yet if the damage would not have happened had the plaintiff himself or those in whose charge he has placed himself used ordinary care, the plaintiff cannot recover from the defendant.

(2) But where the plaintiff's own negligence is only remotely connected with, and not a necessary factor of the accident, and the defendant might by the exercise of ordinary care have avoided the accident, the plaintiff will be entitled to recover.

General illustrations.—(1) This rule is well illus-

cases, very often a person is taken to warrant the safety of what he has to do under the contract.

trated by two cases, in each of which the *damnum* was the same. In *Fordham v. L. B. & S. C. R. Co.* (*L. R.*, 4 *C. P.* 719) the facts were these: The guard of one of the defendants' trains, forcibly closed the door of one of the carriages without giving any warning, whereby the hand of the plaintiff, *who was entering* the carriage, was crushed. It was held, that the jury were justified in finding that the guard was guilty of negligence, and that there was no contributory negligence on the part of the plaintiff.

(2) Where, however, the plaintiff, on entering a railway carriage, *left his hand on the edge* of the door half a minute after so entering, and the guard gave due warning before shutting the door, it was held that the act was attributable to the plaintiff's contributory negligence, in leaving his hand carelessly upon a door which he must have known would be immediately shut. But for that fact no accident would have happened (*Richardson v. Metropolitan R. Co.*, *L. R.*, 3 *C. P.* 326, and see *Batchelor v. Fortescue*, 11 *Q. B. D.* 474).

(3) And so, in cases of collision between carriages, the question is, whether the disaster was occasioned wholly by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the disaster, by his own negligence, or want of common and ordinary care, that, but for his default in this respect, the disaster would not have happened. In the former case he recovers, in the latter not (*Tuff v. Warman*, 27 *L. J.*, *C. P.* 322); and for further illustrations of the rule, see *Sketton*

v. *L. & N. W. R. Co.*, *L. R.*, 2 *C. P.* 631; *Stubley v. L. & N. W. R. Co.*, *L. R.*, 1 *Ex.* 13; *Stapley v. L. B. & S. C. R. Co.*, *L. R.*, 1 *Ex.* 21; *Cliff v. Mid. L. Co.*, *L. R.*, 5 *Q. B.* 258; *Ellis v. G. W. R. Co.*, *L. R.*, 9 *C. P.* 551; *Armstrong v. Lanc. & York. R. Co.*, *L. R.*, 10 *Ex.* 47; and *Darey v. L. & S. W. R. Co.*, 12 *Q. B. D.* 70.

(4) **Illustrations where negligence of plaintiff no excuse.**—If, however, although the plaintiff has been guilty of some want of care, it does not appear that the accident would not have happened if he had used ordinary care, he will be entitled to recover (*Radley v. L. & N. W. R. Co.*, *L. R.*, 1 *App. Cas.* 754; see also *Dublin, Wicklow, and Wexford R. Co. v. Slattery*, 3 *App. Cas.* 1155; *Watkins v. G. W. R. Co.*, 46 *L. J.*, *C. P.* 817). The law on this point is thus summarized by Willes, J.: "If both parties were equally to blame, and the accident *the result* of their joint negligence, the plaintiff could not be entitled to recover. If the negligence and default of the plaintiff was in any degree the *proximate cause* of the damage, he could not recover, however great may have been the negligence of the defendant. But if the negligence of the plaintiff was only remotely connected with the accident, then the question is, whether the defendant might not, by the exercise of ordinary care, have avoided it" (*Tuff v. Warman*, 27 *L. J.*, *C. P.* 322). Therefore, where the plaintiff left his ass with its legs tied in a public road, and the defendant drove over it, and killed it, he was held to be liable; for he was bound to drive carefully, and circumspectly, and had he done so he

might readily have avoided driving over the ass (*Davies v. Mann*, 10 *M. & W.* 549).

(5) So, where the plaintiff was a passenger on an omnibus which was racing with the defendant's omnibus, and in trying to avoid a cart a wheel of the defendant's omnibus came in contact with a step of the omnibus on which the plaintiff was riding, which caused the latter to swing towards the curb-stone, and the speed rendering it impossible to pull up, the seat on which the plaintiff sat struck against a lamp-post and he was thrown off: Held, that the jury were properly directed that the defendant was liable (*Rigby v. Hewitt*, 5 *Ex.* 247). It will be observed, that in this case the alleged contributory negligence was not that of the plaintiff himself, but of the driver of the omnibus in which he was riding, and which, if proved, would have been just as good a defence as the personal negligence of the plaintiff himself (*Thoroughgood v. Bryan*, 8 *C. B.* 115).

(6) The plaintiff, a passenger on board a steamboat, was injured by the falling of an anchor, caused by the defendant's steamboat striking the other steamboat. It was no defence to say that the accident arose in part from the negligent stowage of the anchor, or that the plaintiff was in a part of the vessel where he ought not to have been (*Greenland v. Chaplin*, 5 *Ex.* 243).

(7) **Contributory negligence in infants.**—It was formerly thought that, where the plaintiff was a child of tender years, it was no defence to an action of negligence to prove that he himself had contributed to his injury (*Lynch v. Nurdin*, 1 *Q. B.* 29).

But it seems to be now clearly settled, that the principle of contributory negligence applies to all cases, whether the plaintiff can be considered of an age to know the nature of the act he is doing, or otherwise (*Singleton v. Eastern Counties R. Co.*, 7 C. B., N. S. 287; *Abbot v. McFie*, *Hughes v. McFie*, 2 H. & C. 744; 33 L. J., Ex. 177). Thus, where the defendant exposed in a public place for sale, unfenced or without superintendence, a machine which might be set in motion by any passer-by, and which was dangerous when in motion; and the plaintiff, a boy four years of age, by the direction of his brother, seven years old, placed his finger within the machine, whilst another boy was turning the handle which moved it, and his fingers were crushed: Held, that the plaintiff could not maintain any action for the injury (*Mangan v. Atterton*, L. R., 1 Ex. 239).

But it appears that what would amount to contributory negligence in a grown-up person, may not be so in a child of tender years (per Kelly, C. B., *Lay v. M. R. Co.*, 34 L. T. 30).

ART. 68.—*Onus of Proof.*

(1) In general, the onus of proving negligence is on the plaintiff (*Hammack v. White*, 11 C. B., N. S. 588; *Toomey v. L. & B. R. Co.*, 3 *ibid.* 146).

(2) But where a thing is solely under the management of the defendant or his servants,

and the accident is such as, in the ordinary course of events, does not happen to those having the management of such things, and using proper care, it affords *prima facie* evidence of negligence (*Scott v. Lond. Dock Co.*, 34 *L. J.*, *Ex.* 220; *Byrne v. Boodle*, 2 *Hurl. & C.* 722).

(1) Thus, where a horse drawing a brougham of the defendant suddenly bolted without any explainable cause, and swerving on to the foot-path collided with and injured the plaintiff, it was held that the plaintiff had not produced any evidence of negligence sufficient to entitle him to recover. For it is no negligence to drive a horse along a public street, and horses will occasionally run away without any negligence of the driver (*Manzoni v. Douglas*, 6 *Q. B. D.* 145).

(2) On the other hand, where a person was walking in a public street and a barrel of flour fell upon him from a window of the defendant's house, it was held sufficient *prima facie* evidence of negligence to cast on the defendant the onus of proving that the accident was not attributable to his want of care. For barrels do not usually fall out of windows in the absence of want of care (*Byrne v. Boodle*, 33 *L. J.*, *Ex.* 13). In short, the question must always depend on the nature of the accident. In general, where an accident may be equally susceptible of two explanations, one involving negligence, and the other not, the plaintiff must give some evidence of want of care.

But where the probability is that the accident could only have had a negligent origin, the presumption will be the other way.

ART. 69.—*Duties of Judge and Jury.*

Whether there is *reasonable* evidence to be left to the jury, of negligence occasioning the injury complained of, is a question for the judge. It is for the jury to say whether, and how far, the evidence is to be believed (*Met. R. Co. v. Jackson, L. R., 8 H. L. 193*).

That is to say, the judge should not leave the case to the jury merely because there is a *scintilla* of evidence, but should rather decide whether there is *reasonable* evidence of negligence, and then leave it to the jury to find whether the facts which afford that reasonable evidence are true. The law is thus summarized in the above important case. "The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence *may* be reasonably inferred: the jurors have to say whether from those facts, when submitted to them, negligence *ought* to be inferred. It is, in my opinion, of the greatest importance, in the administration of justice, that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there

are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury, upon the ground that in his opinion negligence ought not to be inferred. And it would place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever. To take the instance of actions against railway companies : a company might be unpopular, unpunctual and irregular in its service, badly equipped as to its staff, unaccommodating to the public, notorious, perhaps, for accidents occurring on the line, and when an action was brought for the consequences of an accident, jurors, if left to themselves, might, upon evidence of general carelessness, find a verdict against the company in a case where the company was really blameless. It may be said that this would be set right by an application to the court in banco, on the ground that the verdict was against evidence; but it is to be observed that such an application, even if successful, would only result in a new trial. And on a second trial, and even on subsequent trials, the same thing might happen again."

ART. 70.—*Limitation.*

An action for damage incurred by another's negligence must be commenced within six years.

ART. 71.—*Exception to maxim “actio personalis moritur cum personâ” (a).*

(1) Whenever the death of a person is caused by a wrongful act, neglect, or default of another which would (if death had not ensued) have entitled the party injured to maintain an action in respect thereof, then the person who would have been liable if death had not ensued, shall be liable to an action, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony (9 & 10 Vict. c. 92, s. 1).

(2) Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death, to the parties respectively for whom and for whose benefit

(a) It will be observed that the Act applies not only to deaths caused by *negligence*, but to deaths however tortiously caused. As, however, cases under the Act usually arise out of negligence, it has been thought most convenient to treat of the Act under the present section.

such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct (sect. 2).

(3) Not more than one action shall lie for the same cause of complaint, and every such action shall be commenced within twelve calendar months after the death of such deceased person (sect. 4).

(4) Where there is no executor or administrator, as above stated, or if there is such executor or administrator, but no action is brought within six months by him, the action may be brought in the name or names of all or any of the persons for whose benefit the personal representative would have sued (27 & 28 Vict. c. 95, s. 1, and see *Holleran v. Bagnell*, 4 L. R., Ir. 740).

In respect to actions brought under the provisions of this statute (commonly known as Lord Campbell's Act), the following points must be remembered—

(1) The personal representatives (or should they not sue, the parties mentioned in the last clause of the rule) can only maintain the action in those cases in which, had the deceased lived, he himself could have done. So, if the deceased had been guilty of such contributory negligence as would have barred

him from succeeding, those claiming as his representatives can stand in no better position (*Pym v. G. N. R. Co.*, 4 B. & S. 396).

(2) Every such action must be brought for the benefit of the wife, husband, parent and child of the deceased.

The word *parent* shall include a grand-parent and a step-parent. The word *child*, a grand-child and a step-child, and a child *en ventre sa mère* (*The George and Richard*, L. R., 3 Adm. 466; 24 L. T. 717 (a)), but not a bastard (*Dickinson v. N. E. R. Co.*, 2 Hurl. & Colt. 735).

The jury may proportion the damages amongst these persons in such shares as they may think proper.

(3) The persons for whose benefit the action is brought must have suffered some pecuniary loss by the death of the deceased (*Franklin v. S. E. R. Co.*, 3 Hurl. & N. 211).

By the expression "*pecuniary loss*" is meant "some substantial detriment in a worldly point of view." So, loss of reasonably anticipated pecuniary benefits, loss of education or support is sufficient (*Pym v. G. N. R. Co.*, *sup.*; *Franklin v. S. E. R. Co.*, *sup.*). For instance, where the plaintiff was old and infirm and had been partly supported by his son, the deceased (*Hetherington v. N. E. R. Co.*, 9 Q. B. D. 160).

(a) The reader must not be misled by this case into concluding that an action *in rem* against a ship may be maintained under the Act (see *Seward v. The Vera Cruz*, 10 App. Cas. 59).

Loss of mere gratuitous liberality (*Dalton v. S. E. R. Co.*, 27 *L. J.*, *C. P.* 227), or to his personal property by expenses incurred in medical treatment is equally so (*Bradshaw v. Lanc. & York. R. Co.*, *L. R.*, 10 *C. P.* 89; but see *Leggot v. G. N. R. Co.*, 1 *Q. B. D.* 599). Funeral expenses *aliter* (per Bramwell, *Osborn v. Gillet*, *L. R.*, 8 *Ex.* 88); nor can a person recover compensation where the pecuniary advantage he has lost arose from a contract between himself and the deceased, and not from his relationship to him (*Sykes v. N. E. R. Co.*, 44 *L. J.*, *C. P.* 191).

(4) If the deceased had obtained compensation during his lifetime, no further right of action accrues to his representatives on his decease (*Read v. G. E. R. Co.*, *L. R.*, 8 *Q. B.* 555).

(5) The death must be actually caused by the wrongful act for which compensation is sought.

(6) The action must be brought within twelve calendar months after the death of the deceased.

CHAPTER III.

TORTS FOUNDED ON MISUSE OR ABUSE OF PROPERTY
PUBLIC OR PRIVATE.

ART. 72.—*Definition of Nuisance.*

A NUISANCE is a misuse or abuse of a man's own property or proprietary rights, or an unauthorized use of public property, causing either danger to the public (in which case it is called a public nuisance), or merely damage to a private citizen (in which case it is called a private nuisance), and not necessarily depending for its wrongful character on malice or negligence, and not amounting to trespass.

(1) Thus the storing of water on a man's own land in large quantities, and allowing it, either with or without negligence, to escape on to the land of his neighbour, is a private nuisance.

(2) So setting up a noisy or a noisome factory in a residential neighbourhood may be a public or private nuisance according to the number of people annoyed.

(3) Again to dig a hole in a highway is unautho-

rized interference with the property of the public which constitutes a public nuisance.

The law with regard to nuisances mainly depends upon the maxim *sic utere tuo ut alienum non laedas*. Not that that maxim can receive a literal translation, as a man may do many acts which may injure others (ex. gr., build a house which may shut out a fine view, theretofore enjoyed by a neighbour). But such acts are necessarily incidental to the ownership of property. The acts referred to in the maxim, are acts which go beyond the recognized legal rights of a proprietor, acts, so to speak, *ultra vires*, which are an abuse of the legal rights enjoyed by a proprietor.

Torts arising out of nuisances may be conveniently divided into:—(1) those in which the *damnum* consists of some bodily injury; and (2) those in which it consists of some injury to property; and each of these will be separately treated in the two following sections.

Section I.

OF BODILY INJURIES CAUSED BY NUISANCES.

ART. 73.—*When actionable.*

A person who commits a nuisance either public or private, whereby bodily injury is caused to a fellow citizen, is liable to an action for damages.

(1) **Excavations.**—Thus, where a man makes an

excavation adjoining a highway, and keeps it unfenced, he will be liable for any injury occasioned to a person falling into it (*Barnes v. Ward*, 9 C. B. 392; *Bishop v. Trustees of Bedford Char.*, 28 L. J., Q. B. 215).

(2) **Noxious fumes.**—And to keep anything injurious to the health of persons living near, such as a foul cesspool, or to carry on any noisome or noxious employment, is a nuisance. For cases on “Noxious Fumes,” see *Tipping v. St. Helen’s Smelting Co.*, L. R., 1 Ch. 66; *Crump v. Lambert*, L. R., 3 Eq. 409; *Salvin v. N. Brancepath Coal Co.*, L. R., 9 Ch. 705; *Malton Board of Health v. Malton Manure Co.*, 4 Ex. D. 302.

(3) **Statutory nuisances.**—Certain acts have been declared nuisances by statute, and private damage caused by them is of course actionable. Thus by 24 & 25 Viet. c. 100, s. 31 (re-enacting 7 & 8 Geo. 4, c. 18), the setting of spring-guns, man-traps, or other engines calculated to kill or do grievous bodily harm to a trespasser is made a misdemeanor, and even a trespasser hurt thereby may recover; for although it would be partly owing to his own misconduct, yet if the defendant might, by acting rightly, have avoided doing the injury, the plaintiff’s contributory misconduct is no excuse. But this Act does not apply to the setting of traps or guns in the night in dwelling-houses for the protection thereof.

So by the General Highway Act, 5 & 6 Will. 4, c. 50, s. 70, it is made illegal for any person to sink any pit, or erect any steam or other like engine, gin,

or machinery attached thereto, within twenty-five yards from any part of a carriage or cart way, unless concealed within some building, or behind some fence, so as to guard against danger to passengers, horses, or cattle. It also prohibits the erection of windmills within fifty yards, and fires for burning ironstone, limestone, or making bricks or coke, within fifteen yards, of a carriage or cart way.

Sect. 72 prohibits the letting off of fireworks or firearms within fifty feet of the centre of the way, as also the laying of things upon it or obstructing it in any way.

By virtue of this Act any corporal injury caused to an individual by the non-observance of duties thereby created, is actionable, even though the person injured were trespassing at the time (within twenty-five yards of the way). But if the Act has been complied with, any injury, caused by any of the things therein mentioned, would be no ground of action, there being no *injuria* or wrongful act.

Thus, where the defendants were owners of waste land bounded by two highways, and worked a quarry outside the prohibited distance in such land, and the plaintiff walking over the waste, fell into the quarry and broke his leg, it was held that no action lay, the plaintiff being a mere trespasser (*Hounsell v. Smith*, 29 *L. J.*, *C. P.* 203; and see *Binks v. S. Y. R. Co.*, 32 *L. J.*, *Q. B.* 26; *Hardcastle v. S. Y. R. Co.*, 23 *L. J.*, *Ex.* 139).

And so, by the civil law, a trespasser could not recover for injuries suffered whilst trespassing,

through the dangerous business of the landowner, for *extra culpam esse intelligitur si seorsum a viâ forte vel in medio fundo cædebat, quia in loco nulli extraneo jus fuerat versandi* (*Inst.*, lib. iv., iii. 5).

(4) **Ruinous premises.**—To permit premises adjoining a highway, or the land of another, to fall into a ruinous condition is a public nuisance entitling a person injured thereby to damages (*Todd v. Flight*, 30 *L. J.*, *C. P.* 21; see also *Givinnell v. Eames*, *L. R.*, 10 *C. P.* 658; *Nelson v. Liverpool Brewery Co.*, 2 *C. P. D.* 311; *Tarry v. Ashton*, 1 *Q. B. D.* 314).

ART. 74.—*Nuisances created by Ruinous Premises.*

(1) As between landlord and tenant, there is no implied obligation on the part of the former that the property is in a safe condition (*Keats v. Cadogan*, 20 *L. J.*, *C. P.* 21; *Hart v. Windsor*, 12 *M. & W.* 68; *Erskine v. Adeane*, 42 *L. J.*, *Ch.* 835; *L. R.*, 8 *Ch.* 756).

(2) With regard to third parties, the tenant is the person responsible for any injury resulting from the premises being out of repair, and the landlord will also be responsible if he has done any act authorizing the continuance of the dangerous state of the house (per Bovill, *C. J.*, *Pretty v. Birkmore*, *L. R.*, 8 *C. P.* 404; *Broder v. Scullard*, 2 *Ch. D.* 692; *Humphries v. Cousins*, 2 *C. P. D.*

239; *Firth v. Bowling Iron Works Co.*, 3 C. P. D. 254).

(1) Thus, if, in consequence of the ruinous state of a house, the chimney fall and injure the tenant's family, yet he has no remedy, unless the landlord has contracted to keep the house in repair, or unless there was fraud on his part in industriously concealing the defect from the tenant (*Gott v. Gandy*, 23 L. J., Q. B. 1; *Keats v. Cadogan*, 20 L. J., C. P. 76).

(2) The defendant let premises to a tenant under a lease, by which the latter covenanted to keep them in repair. Attached to the house was a coal-cellar under the footway, with an aperture covered by an iron plate, which was, at the time of the demise, out of repair and dangerous. A passer-by, in consequence, fell into the aperture, and was injured: Held, that the obligation to repair, being, by the lease, cast upon the tenant, the landlord was not liable for this accident. And Keating, J., said, "In order to render the landlord liable in a case of this sort, there must be some evidence that he authorized the continuance of this coal shoot in an insecure state; for instance, that he retained the obligation to repair the premises: that might be a circumstance to show that he authorized the continuance of the nuisance. There was no such obligation here. The landlord had parted with the possession of the premises to a tenant, who had entered into a covenant to repair (see also *Gwinnell v. Eamer*, L. R., 10 C. P. 658, and *Rich v. Basterfield*,

16 *L. J., C. P.* 273; and comp. *Roswell v. Prior*, 12 *Mood.* 639).

(3) In *Nelson v. The Liverpool Brewery Co.* (25 *W. R.* 877), Lopes, J., laid it down, that the owner of premises demised to a tenant is not liable for an injury sustained by a stranger, owing to the premises being out of repair, unless he has either contracted to do the repairs, *or has let the premises in a ruinous and improper condition*. It is, however, humbly suggested that the last alternative is not accurate, except where the tenant has not undertaken the repairs (see remarks of Brett, L. J., in *Gwinnell v. Eamer*, *sup.*); and the dictum is not a complete summary of the law, inasmuch as there may be possible cases where the landlord may *prevent* the tenant from repairing a nuisance, by threatening an action for waste.

(4) But in *Todd v. Flight* (30 *L. J., C. P.* 21; 9 *C. B., N. S.* 377), where the declaration contained an allegation that the defendant let the houses when the chimneys were known by him to be ruinous and in danger of falling, that he *kept and maintained them in that state, and that the tenant was under no obligation to repair*, and the case was tried on demurrer, and the allegation was therefore assumed to be true, it was held that the landlord was liable.

ART. 75.—*Nuisances on Roads.*

When a person expressly or impliedly permits others to come on to roads on his land, he is liable for any injury caused to

them by a nuisance thereon or near to the same, but not if they stray from such paths and trespass on the adjoining ground.

(1) **Private roads.**—Thus, a person permitting the use of a pathway to his house, holds out an invitation to all having occasion for coming to the house, to use his footpath, and he is responsible for neglecting to fence dangerous places. And so, also, a shopkeeper, who leaves a trap-door open without any protection, is liable to a person lawfully coming there, who suffers injury by falling through such trap-door (*Tindal, C. J., Lancaster Canal Co. v. Parnaby*, 11 *A. & E.* 243; *Barnes v. Ward*, 9 *C. B.* 420; 19 *L. J.*, *C. P.* 200; *Gautret v. Egerton, L. R.*, 2 *C. P.* 371; *Chapman v. Rothcell*, 27 *L. J.*, *Q. B.* 315; *Lax v. Mayor of Darlington*, 5 *Ex. D.* 28).

But where a person, straying from the ordinary approaches to a house, trespasses where there is no path, and falls into an unguarded pit, he has no remedy for any injury suffered thereby, as the hurt is in such case caused by his own carelessness and misconduct, and accordingly the principle of contributory negligence applies (*Wilde, B., Bolch v. Smith*, 31 *L. J.*, *Ex.* 203).

(2) **Railways.**—Railway companies are responsible for the state of their works, and are liable to any person injured by the faulty construction, or negligent keeping up, of their bridges, embankments, &c. (*Chester v. Holyhead R. Co.*, 2 *Ex.* 251; *Kearney v. L. B. & S. Coast R. Co.*, *L. R.*, 6 *Q. B.* 759; *Lay v. Mid. Rail. Co.*, 34 *L. T.* 30). But if the ruinous

state has been caused by a *vis major* or act of God, (as where a railway gives way through an extraordinary flood,) the company is not liable, provided their line is constructed so firmly as to be capable of resisting the foreseen, though more than ordinary, attacks of the weather (*Withers v. North Kent R. Co.*, 27 L. J., Ex. 417; *G. W. R. Co. of Canada v. Fawcett*, 1 Moore, P. C. C., N. S. 120; *Murray v. Met. R. Co.*, 27 L. T. 762).

(3) **Canals.**—So, too, canal companies are bound to take reasonable care to make their canal as safe as possible to those using it (*Lanc. Canal Co. v. Parnaby*, 11 A. & E. 243).

(4) **Public roads.**—Similar principles apply to public roads; so that where a local authority permits a road to get into a dangerous state, they are liable if any person is thereby injured (*Kent v. Worthing Local Board*, 10 Q. B. D. 118).

ART. 76.—*Nuisances causing Injuries to Guests.*

Mere guests, licensees and volunteers are considered as temporary members of the host's family, and can therefore only recover for injuries caused to them by hidden dangers which they did not know of, but of which the host knew or ought to have known. But visitors on business which concerns the occupier of premises, may maintain an action for any injury caused by the unsafe state

of the premises (see *Tray v. Hedges*, 9 Q. B. D. 80).

(1) **Guests.**—In *Southcot v. Stanley* (1 H. & N. 247), the plaintiff was a guest of the defendant's, and when leaving the house a loose pane of glass fell from the door as he was pushing it open and cut him. It was held, that the plaintiff being a guest, was for the time being one of the family and could not recover for an accident, the liability to suffer which he shared in common with the rest of the family.

(2) **Persons coming on business.**—But where, on the contrary, a workman came *on business* to the defendant's manufactory, and there fell down an unguarded shaft, the defendant was held to be liable; although it would have been otherwise had the plaintiff been one of his own servants, for it was not a hidden danger (*Indermaur v. Dames*, L. R., 1 C. P. 274; 2 *ib.* 311).

(3) The plaintiff, a licensed waterman, having complained to the person in charge, that a barge of the defendants was being navigated unlawfully, was referred to the defendants' foreman. While seeking the foreman, he was injured by the falling of a bale of goods so placed as to be dangerous, and yet to give no warning of danger: Held, that the defendants were liable (*White v. France*, 2 C. P. D. 308).

(4) **Nuisances on railway stations.**—So, in the case of railway companies, the company must take great care to ensure the safety of persons coming to their station, and if through want of light or proper directions any such person is injured, he may main-

tain an action against the company. Thus, where the plaintiff, having a return ticket, arrived at the wrong side of the station, and there being no proper crossing and no directions, crossed the line in order to get to his train, and in doing so, on account of the ill-lighted condition of the station, fell over a switch and was injured, it was held that an action lay against the company (*Martin v. G. N. R. Co.*, 24 L. J., C. P. 209; *Burgess v. G. W. R. Co.*, 32 L. T. 76; *Shepherd v. Mid. R. Co.*, 20 W. R. 705).

ART. 77.—*Limitation.*

Actions for injuries to the person caused by nuisances must be brought within the period of six years next after the cause of action arose.

Exception.—Where the injury has caused death, any action brought by the personal representative, under Lord Campbell's Act, must be commenced within twelve calendar months from the death (see *supra*, p. 185).

Section II.

OF INJURIES TO PROPERTY CAUSED BY NUISANCES.



SUB-SECT. 1.—NUISANCES TO CORPOREAL HEREDITAMENTS.

ART. 78.—*General Liability.*

Any nuisance, public or private, whereby sensible injury is caused to the property of another, or, whereby the ordinary physical comfort of human existence in such property is *materially* interfered with, is actionable.

(1) **Fumes.**—Thus, in the case of *Tippings v. St. Helen's Smelting Co.* (*L. R.*, 1 *Ch.* 66), the fact that the fumes from the company's works killed the plaintiff's shrubs, was held sufficient to support the action; for the killing of the shrubs was an injury to the property.

(2) **Noisy trade.**—So, too, it was said, in *Crump v. Lambert* (*L. R.*, 3 *Eq.* 409), that smoke unaccompanied with noise, or with noxious vapour, noise alone, and offensive vapours alone, although not injurious to health, may severally constitute a nuisance; and that the material question in all such cases is, whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence.

(3) And so, again, in *Walter v. Selfe* (4 *D. G. &*

Sm. 322), Vice-Chancellor Knight Bruce said : "Both on principle and authority, the important point next for decision may properly, I conceive, be put thus: Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among English people?" (and see *Soltau v. De Held*, 2 *Sim.*, *N. S.* 133; and *Inchbald v. Robinson*, *L. R.*, 4 *Ch.* 388).

(4) **Noisy Entertainments.**—So, too, the collection of a crowd of noisy and disorderly people, to the annoyance of the neighbourhood, outside grounds in which entertainments with music and fireworks are being given for profit, is a nuisance, even though the entertainer has excluded all improper characters, and the amusements have been conducted in an orderly way (*Walker v. Brewster*, *L. R.*, 5 *Eq.* 25; and see also *Inchbald v. Robinson*, *L. R.*, 4 *Ch.* 388).

(5) So the letting off of rockets, and the establishment of a powerful band of music playing twice a week for several hours within one hundred yards of a dwelling-house, are nuisances (*Ib.*).

(6) **Dangerous substances.**—So, if a person allows substances which he has brought on his land to escape into his neighbour's, an action lies without proof of negligence. Thus, as we have seen (*supra*, p. 19), one who brings or collects water upon his land, does so at his peril, for if it escape and injure his

neighbour, he is liable, however careful he may have been (*Fletcher v. Rylands*, *L. R.*, 3 *H. L.* 330 ; *Fletcher v. Smith*, 2 *App. Ca.* 781), unless the escape was caused by something quite beyond the possibility of his control, as the act of God or malice of a third party (*Nichols v. Marsland*, 2 *Ex. Div.* 1 ; *Box v. Jubb*, 4 *Ex. Div.* 77) ; but where the water is naturally upon the land, the owner is only liable for negligence in keeping it. And so, also, where water is brought upon land, or into a house, by the defendant, but for the joint use of himself and the plaintiff, the latter cannot complain of any damage (not attributable to the defendant's negligence) which its escape may cause to him (*Anderson v. Oppenheimer*, 5 *Q. B. D.* 602).

(7) It has even been held in a recent case (*Whalley v. L. & Y. R. Co.*, 13 *Q. B. D.* 131) that even if a person has not brought the dangerous substance on to his land, he is yet liable if he takes *active means* to shift the danger from himself to his neighbour.

In that case, by reason of an unprecedented rainfall, a quantity of water accumulated against one of the sides of the defendants' embankment so as to endanger its stability. To prevent this the defendants cut trenches in the embankment, and so let the water flow on to the plaintiff's land, and injured it. It was held that although the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff. They would have been entitled, no doubt, to *prevent* the

water getting against their embankment, but they had no right, when once it was there, to transfer it to their neighbour, any more than the owner of a natural lake could drain it on to his neighbour's lands.

(8) **Other examples.**—Other examples of nuisance to corporeal hereditaments, are overhanging eaves from which the water flows on to another's property (*Battishill v. Reed*, 25 *L. J., C. P.* 290); or overhanging trees, or pigstys creating a stench, erected near to another's house. And it would seem that noisy dogs, preventing the plaintiff's family from sleeping, are nuisances, if the jury find that such discomfort is caused; although, where the jury find that no serious discomfort has arisen, the court will not interfere (*Street v. Gugwell, Selwyn's N. P.*, 13th ed. 1090). So, also, a small-pox hospital, so conducted as to spread infection to adjoining lands, is a nuisance (*Hill v. Metropolitan Asylums Board*, 6 *App. Ca.* 193).

ART. 79.—*Reasonableness of Place.*

Where an act is proved to interfere with the comfort of an individual, so as to come within Art. 78, it cannot be justified by the fact that it was done in a reasonable place (*Bamford v. Turnley*, 31 *L. J., Q. B.* 286; *Hill v. Metropolitan Asylums Board*, *supra*). But what would be a nuisance in one locality

may not be one in another (*St. Helen's Smelting Co. v. Tippings*, 11 H. L. C. 650).

(1) The spot selected may be very convenient for the defendant, or for the public at large, but very inconvenient to a particular individual who chances to occupy the adjoining land; and proof of the benefit to the public, from the exercise of a particular trade in a particular locality, can be no ground for depriving an individual of his right to compensation in respect of the particular injury he has sustained from it.

(2) In *St. Helen's Smelting Co. v. Tippings* (*supra*), Lord Westbury said: "In matters of this description, it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter,—namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves,—whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in the immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property,

and for the benefit of the inhabitants of the town, and the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground of complaint because, to himself individually, there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation or business is a material injury to *property*, then unquestionably arises a very different consideration. I think that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances, the immediate result of which is sensible injury to the value of the property." And Lord Cranworth said (referring to a case which he had tried when a Baron of the Exchequer): "It was proved incontestably that smoke did come, and in some degree interfere with a certain person; but I said, 'You must look at it, not with a view to the question whether abstractedly that quantity of smoke was a nuisance, but *whether it was a nuisance to a person living in the town of Shields.*'"

ART. 80.—*Plaintiff coming to the Nuisance.*

It is no answer to an action for nuisance, that the plaintiff knew that there was a nuis-

ance, and yet went and lived near it (*Hole v. Barlow*, 27 *L. J.*, *C. P.* 208).

Or in the words of Mr. Justice Byles in the above case, "It used to be thought that if a man knew that there was a nuisance and went and lived near it, he could not recover, because it was said it is he that goes to the nuisance, and not the nuisance to him. That, however, is not law now." The justice of this is obvious from the consideration, that if it were otherwise, a man might be wholly prevented from building upon his land if a nuisance was set up in its locality, because the nuisance might be harmless to a mere field, and therefore not actionable, and yet unendurable to the inhabitants of a dwelling-house.

ART. 81.—*How far Right to commit a Nuisance can be acquired.*

The right to carry on a noisome trade in derogation of the rights of another may be gained by statute, custom, grant, or prescription, but the right to carry on a trade which creates a public nuisance can only be acquired by clear statutory authority (see *Elliotson v. Feetham*, 2 *Bing. N. C.* 134; and see *Flight v. Thomas*, 10 *A. & E.* 590).

(1) Thus, a railway company were by their Act authorized, among other things, to carry cattle, and also to purchase by agreement any lands not exceeding in the whole fifty acres, *in such places as should*

be deemed eligible, for the purpose of providing additional stations, yards, and other conveniences, for receiving, loading, or keeping any cattle, goods, or things, conveyed, or intended to be conveyed, by the railway. Under this power, the railway company bought land adjoining one of their stations, and used it as a yard for their cattle traffic. The noise of the cattle and drovers was a nuisance to the owners of houses near to the station, which, but for the Act, would clearly have entitled them to maintain an action. It was, however, held, that the purpose for which the land was acquired, being expressly authorized by the Act, and *being incidental and necessary* to the authorized use of the railway for the cattle traffic, the company were entitled to do what they did, and were not bound to choose a site more convenient to other persons. In giving judgment Lord Halsbury said: "It cannot now be doubted, that a railway company constituted for the purpose of carrying passengers, or goods, or cattle, are protected in the use of the functions with which Parliament has entrusted them, if the use they make of those functions necessarily involves the creation of what would otherwise be a nuisance at common law." His Lordship, on the construction of the particular Act, came to the conclusion that the powers of the Act did necessarily involve the creation of a nuisance by the company somewhere along their line, and gave to the company the absolute discretion as to the locality, and accordingly held that the parties injured had no remedy (*L. & B. R. Co. v. Truman*, 11 App. Cas. 45).

(2) The last-mentioned case must, however, be carefully distinguished from that of *Met. Asylum District Board v. Hill* (6 *App. Cas.* 193). There it appeared, that by their act, the Metropolitan Asylum District Board were authorized to purchase lands and erect buildings, to be used as hospitals. But it did not by direct or imperative provision order these things to be done. The Board erected a smallpox hospital, which was, in point of fact, a nuisance to owners of neighbouring lands. On these facts it was held, that the Board could not set up the statute as a defence. Lord Blackburn, in the course of his judgment, laid it down, that on those who seek to establish that the legislature intended to take away the private rights of individuals lies the burden of showing that such an intention appears by express words or *necessary implication*. And Lord Watson affirmed that where the terms of a statute are not imperative but permissive, the fair inference is that the legislature intended that the discretion, as to the use of the general powers thereby conferred, should be exercised in strict conformity with private rights. It is somewhat difficult to reconcile this last dictum with the decision in the *L. & B. R. Co. v. Truman*, and possibly it requires to be diluted. The distinction, however, between the *two cases* was pointed out by Lord Selborne (11 *App. Cas.* 57) as follows :—"In that case (*Met. Asylum District Board v. Hill*), the establishment of a smallpox hospital within certain local limits was not specially authorized, as the construction of the London and Brighton Railway for the purpose (among other things) of the loading,

carriage, and unloading of cattle, and other animals was here. If it had been, I do not think that this House would have considered the case of any adjacent land in a situation not defined, which the Board might have been authorized to purchase by agreement for the enlargement, as they might think desirable, of the hospital premises, different from that of the hospital itself. In that case, no use of any land which must *necessarily* be a nuisance at common law was authorized; it was not shown to be impossible that lands might be acquired in such a situation, and of such extent, as to enable a smallpox hospital to be erected upon them without being a nuisance to adjoining land. Here there can be no question that the legislature has authorized acts to be done for the necessary and ordinary purposes of the railway traffic (*e. g.*, those complained of in *Rex v. Peare*, 4 B. & Ad. 30) which would be nuisances at common law, but which being so authorized are not actionable." His Lordship then came to the conclusion, that the powers for making cattle yards were *ejusdem generis* with the other ordinary powers of the company, and that as the exercise of the ordinary powers necessarily created nuisances (*e. g.*, smoke, noise, and so on) which were not actionable, so the exercise of the power in question necessarily created nuisances which were therefore not actionable.

SUB-SECT. 2.—NUISANCES TO INCORPOREAL
HEREDITAMENTS.

Introductory.—A servitude is a duty or service which one piece of land is bound to render, either to another piece of land, or to some person other than its owner. The property to which the right is attached is called the dominant tenement, that over which the right is exercised being denominated the servient tenement.

Servitudes are either natural or conventional. Natural servitudes are such as are necessary and natural adjuncts to the properties to which they are attached (such as the right of support to land in its natural state), and they apply universally throughout the kingdom. Conventional servitudes, on the other hand, are not universal, but must always arise either by custom, prescription or grant. The right to the enjoyment of a conventional servitude is called an *easement* or a *profit à prendre*, according as the right is merely a right of user or a right of acquisition.

As to what kind and what length of user will give a right to the various kinds of servitudes known to our law, and as to what servitudes are governed by the common law doctrines of prescription and what by the Prescription Act, all these are matters of real property law, for which I must refer the reader to works on that subject; but wherever I shall hereafter speak of a servitude imposed, or an easement or profit *à prendre* gained, by custom or prescription, I must

be understood to mean *properly* imposed or gained, in accordance with the doctrines of the law in reference to such matters of title.

ART. 82.—*Disturbance of Right of Support for Land without Buildings.*

(1) Every person commits a tort, who so uses his own land as to deprive his neighbour of the subjacent or adjacent support of minerals necessary to retain such neighbour's land in its natural and unencumbered state (*Backhouse v. Bonomi*, 9 H. L. C. 503; *Birm. Corp. v. Allen*, 6 Ch. D. 284). But there is no right to the support afforded by subterranean water (*Popplewell v. Hodgkinson*, L. R., 4 Ex. 248).

(2) In order to maintain an action for disturbance of this right, some appreciable damage must be shown (*Smith v. Thackerah*, L. R., 1 C. P. 564), or, where an injunction is claimed, some irreparable damage must be threatened (*Birm. Corp. v. Allen*, *supra*).

(3) The right of support may be destroyed or prevented from arising by covenant, grant or reservation, but the language of the instrument must be clear and unambiguous (*Rowbotham v. Wilson*, 8 H. L. C. 348; *Aspden v.*

Seddon, L. R., 10 *Ch. App.* 394, and cases there cited).

(1) In *Humphreys v. Brogden*, Lord Campbell (in delivering the judgment of the court) said: "The right to *lateral* support from adjoining soil is not, like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed, as much as after the expiration of twenty years or any longer period. *Pari ratione*, where there are separate freehold from the surface of the land and the mines belonging to different owners, we are of opinion that the owner of the surface, while unencumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata. Those strata, may, of course, be removed by the owner of them, so that a sufficient support is left; but if the surface subsides and is injured by the removal of these strata, although the operation may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. Unless the surface close be entitled to this support from the close underneath, corresponding to the lateral support to which he is entitled from the adjoining surface close, it cannot be securely enjoyed as pro-

perty, and under certain circumstances (as where the mineral strata approach the surface and are of great thickness) it might be entirely destroyed. We likewise think, that the rule giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation or covenant, must be laid down generally, without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the minerals."

(2) But a servitude cannot be created by the act of a third party in cases where, but for that act, no servitude would have existed. Between the land of the plaintiffs and that of the defendants, who were the owners of a colliery, there was an intermediate piece of land, the coal under which had been worked out some years before by a third party. The effect of the cavity was, that when the defendants worked their coal, subsidence was caused in the surface of the plaintiff's land. It was admitted that if the intermediate land had been in its natural state no injury would have been caused to the plaintiffs by the defendants' workings. Held, that the plaintiffs had no right of action against the defendants. And Sir G. Jessel, M. R., said:—"It appears to me that it would be really a most extraordinary result that the man upon whom no responsibility whatever originally rested, who was under no liability whatever to support the plaintiffs' land, should have that liability thrown upon him, without any default of his own" (*Corporation of Birmingham v. Allen*, 6 Ch. D. 290).

Exception.—Companies governed by the Railway Clauses Consolidation Act, 1845, do not acquire any such right to subjacent support, by purchasing the surface; and the owners of the mines may, after having given notice to the company, so as to give them the opportunity of purchasing the mines, work them with impunity, in the ordinary way (*G. W. R. Co. v. Bennett, L. R., 2 H. L. 29*). But neither will an action lie against the company for any damage suffered by the mine owner, although perhaps he may demand compensation under the act (see *Dunn v. Birm. Canal Co., L. R., 8 Q. B. 42*).

ART. 83.—Disturbance of Support of Buildings.

(1) A tort is not committed by one, who so deals with his own property, as to take away the support necessary to uphold his neighbour's *buildings*, unless a right to such support has been gained by grant, express or implied (*Partridge v. Scott, 3 M. & W. 220*; *Brown v. Robins, 4 H. & N. 186*; *N. E. R. Co. v. Elliott, 29 L. J., Ch. 808*; *Angus v. Dalton, 6 App. Cas. 740*).

(2) But the owner of land may maintain an action for a disturbance of the natural right to support for the surface, notwithstanding buildings have been erected upon it, provided the weight of the buildings did

not cause the injury (*Brown v. Robins*, 4 H. & N. 186; *Stroyan v. Knowles*, 6 ib. 454).

(1) Thus, in *Partridge v. Scott* (*ubi sup.*), it was said that "rights of this sort, if they can be established at all, must, we think, have their origin in grant; if a man builds a house at the extremity of his land, he does not thereby acquire any easement of support or otherwise over the land of his neighbour. He has no right to load his own soil, so as to make it require the support of his neighbours, unless he has some grant to that effect."

(2) So again, as between adjoining houses, there is no obligation towards a neighbour, cast by law on the owner of a house, merely as such, to keep it standing and in repair; his only duty being to prevent it from being a nuisance, and from falling on to his neighbour's property (*Chandler v. Robinson*, 4 Ex. 163).

(3) But where, on the other hand, houses are built by the same owner, adjoining one another, and depending upon one another for support, and are afterwards conveyed to different owners, there exists, by a presumed grant and reservation, a right of support to each house from the adjoining ones (*Richards v. Rose*, 9 Ex. 218).

(4) And so, where adjoining houses are built by separate owners, a right of support may be gained by long user (*Hide v. Thornborough*, 2 C. & K. 250; *Angus v. Dalton*, 6 App. Ca. 740).

[N.B.—The whole subject of the support of buildings was under the consideration of the House of

Lords in the celebrated case of *Angus v. Dalton*, which was twice argued before their lordships. In the Queen's Bench Division it was held by two judges to one, that where it was admitted that no grant by deed had been made, no implication of a grant could arise. The Court of Appeal and the House of Lords reversed this, holding that the enjoyment during twenty years of the support in point of fact raised a presumption that the plaintiffs were entitled thereto as a matter of right, and that the circumstance that no grant of the easement had been made was not material; although it was open to the defendant to rebut the presumption by evidence, either that the owner of the servient tenement did not know the nature of the easement, or was incapable of making a grant. The student should study the judgments in this case carefully.]

ART. 84.—*Disturbance of Right to Light and Air.*

(1) There is no right *ex jure naturæ*, to the free passage of light and air to a house or building (2 & 3 Will. 4, c. 71, s. 6); but such a right may be acquired, either by grant (which may be either express or implied) from the contiguous proprietors, or by reservation on the sale of the servient tenement, or by prescription.

(2) Where such a right has been gained, no person will be allowed to interrupt such

passage, unless he can show that, for whatever purpose the plaintiff might wish to employ the light, there would be no *material* interference with it by the alleged obstruction (*Yates v. Jack*, *L. R.*, 1 *Ch.* 295; and see per Best, C. J., in *Back v. Stacey*, 2 *C. & P.* 465, and *Dent v. Auction Mart Co.*, *L. R.*, 2 *Eq.* 245; *Robson v. Whittingham*, *L. R.*, 1 *Ch.* 442, and *Theed v. Debenham*, 2 *Ch. D.* 165).

(3) The question whether there has been a distinction in fact depends on the facts of each case (*Parker v. First Avenue Hotel Co.*, 24 *Ch. D.* 282).

(1) Thus, in *Yates v. Jack* (*sup.*), where it was contended that the plaintiff was not entitled to relief, because, for the purpose of his *then present* trade, he was obliged to shade and subdue the light, and that therefore he suffered no actual damage, Lord Cranworth said: "This is not the question. It is comparatively an easy thing to shade off a too powerful glare of sunshine, but no adequate substitute can be found for a deficient supply of daylight. I desire, however, not to be understood as saying that the plaintiffs would have no right to an injunction unless the obstruction of light were such as to be injurious to them in the trade in which they are now engaged. The right conferred, or recognized, by the statute 2 & 3 Will. 4, c. 71, is an absolute and indefeasible right to the enjoyment of the light, without reference to the purpose for which it has been used. There-

fore, I should not think the defendant had established his defence, unless he had shown, that, for whatever purpose the plaintiffs might wish to employ the light, there would be no material interference with it" (and see *Aynsley v. Glover*, *L. R.*, 18 *Eq.* 544, and 10 *Ch.* 283).

(2) And so, where ancient lights are obstructed, the fact that the owner of the building, to which the ancient rights belong, has himself contributed to the diminution of the light, will not in itself preclude him from obtaining an injunction or damages (*Tapling v. Jones*, 11 *H. L. C.* 290; *Arcedeckne v. Kelk*, 2 *Giff.* 683; *Straight v. Burn*, *L. R.*, 5 *Ch.* 163).

(3) Nor will an enlargement of an ancient light, (although it will not enlarge the right, *Cooper v. Hubbock*, 31 *L. J.*, *Ch.* 123,) diminish or extinguish it. And, therefore, where the owner of a building having ancient lights, enlarges or adds to the number of windows, he does not preclude himself from obtaining an injunction to restrain an obstruction of the ancient lights (*Aynsley v. Glover*, *sup.*).

(4) The dominant tenement must be a building; and, therefore, a person who grants a lease of a house and garden, is not precluded (under the doctrine of not derogating from his own grant) from building on open ground retained by him adjacent to the house and garden, though, by so doing, the enjoyment of the garden, as pleasure ground, is interfered with, there being no obstruction of light and air to the house (*Potts v. Smith*, *L. R.*, 6 *Eq.* 311).

(5) **Illustrations of implied grant.**—A man cannot derogate from his own grant. Therefore, if one grants a house to A., but keeps the land adjoining

the house in his own hands, he cannot build upon that land so as to darken the windows of the house. And if he have sold the house to one and the land to another, the latter stands in the grantor's place as regards the house (see per Bayley, J., *Canham v. Fisk*, 2 Cr. & J. 128; *Sicansborough v. Coventry*, 9 Bing. 309; *Davies v. Marshall*, De G. & Sm. 557; *Freuen v. Phillips*, 11 C. B., N. S. 449).

(6) And so, where two separate purchasers buy two unfinished houses from the same vendor, and, at the time of the purchase, the windows are marked out, this is a sufficient indication of the rights of each, and implies a grant (*Compton v. Richards*, 1 Pr. 27; *Glave v. Harding*, 27 L. J., Ex. 286; *Russell v. Watts*, 10 App. Cas. 590).

(7) Similarly, where two lessees claim under the same lessor, it is said that they cannot, in general, encroach on one another's access to light and air (*Coutts v. Gorham*, 1 M. & M. 396; *Jacomb v. Knight*, 32 L. J., Ch. 601). But it would seem that this statement of the law is too wide, as it is difficult to see what right the second lessee can have against the first, for no act of his can be a derogation from the second demise. And, indeed, it has been distinctly held, that where the grantor sells the land but retains the house, there is no duty upon the grantee of the land to abstain from building upon it, and the grantor cannot prevent him; for to do so would be as much as in the preceding case, a derogation from his own grant (*White v. Bass*, 31 L. J., Ex. 283; *Wheeldon v. Burrows*, 12 Ch. D. 231).

(8) Again, if the owner of the dominant tenement

authorizes the owner of the servient tenement, either verbally or otherwise, to do an act of notoriety upon his land, which, when done, will affect or put an end to the enjoyment of the easement, and such act is done, the licensor cannot retract. Thus, where A. had a right to light and air across the area of B., and gave B. leave to put a skylight over the area, which B. did: it was held that A. could not retract his licence, although it was found that the skylight obstructed the light and air. For it would be very unreasonable, that after a party has been led to incur expense in consequence of having obtained a licence from another to do an act, that other should be permitted to recall his licence (*Winter v. Brockwell*, 8 *East*, 309; *Webb v. Paternoster, Palmer*, 71).

(9) **Reservation of light seldom implied.**—But although by the grant of a part of a tenement there will pass to the *grantee* all those continuous and apparent easements over the other part of the tenement which are necessary to the enjoyment of the part granted, and have been hitherto used therewith; yet as a general rule there is no corresponding implication in favour of the *grantor*, though there are certain exceptions to this, as in the case of ways of necessity. A workshop and an adjacent piece of land belonging to the same owner were put up for sale by auction. The workshop was not then sold, but the piece of land was. A month after the conveyance the vendor agreed to sell the workshop to another person. The workshop had windows overlooking and receiving their light from the piece of land first sold. The purchaser of the piece of land

proposed to build thereon so as to obstruct the light of the workshop windows. On an action being brought to restrain him, it was held that as the common vendor had not, when he conveyed the piece of land, expressly reserved the access of light to his windows, the purchaser thereof could build so as to obstruct them, and that whatever might have been the case had both lots been sold at one auction, there was under the circumstances no implied reservation of light over the piece of land first sold (*Wheeldon v. Burrows*, *ubi sup.*).

(10) On the other hand, although there may be no reservation of the right to light in express terms, yet, if looking at the whole transaction, the nature of the property, and so on, a reservation of the right to light appears to be reasonably implied, the Court will give effect to it. (See and consider circumstances in *Russell v. Watts*, 10 *App. Cas.* 590.)

ART. 85.—*Disturbance of Water Rights.*

(1) The right to the use of the water of a natural surface stream, belongs, *jure naturæ* and of right, to the owners of the adjoining lands, every one of whom has an equal right to use the water which flows in the stream; and consequently, no proprietor can have the right to use the water to the prejudice of any other proprietors (*Chasemore v. Richards*, 7 *H. L. Ca.* 349; *Wright v. Howard*, 1 *S. & S.*

203; *Dickenson v. Gr. Junc. Canal Co.*, 7 Ex. 299).

(2) There can, however, be no property in water which runs through natural undefined channels underground (*Chasemore v. Richards*, *sup.*)

(1) Every riparian owner may reasonably use the stream for drinking, watering his cattle or turning his mill, and other purposes, provided he does not thereby seriously diminish the stream (see *Embrey v. Owen*, 6 Ex. 353).

(2) If the rights of a riparian proprietor are interfered with, as by diverting the stream or abstracting or fouling the water, he may maintain an action against the wrongdoer, even though he may not be able to prove that he has suffered any actual loss (*Wood v. Waud*, 3 Ex. 748; *Embrey v. Owen*, 6 Ex. 369; *Crossley v. Lightowler*, L. R., 2 Ch. 478). Nevertheless, where a non-riparian owner, *with the licence of a riparian owner*, takes water from a river, and after using it for cooling certain apparatus, returns it undiminished in value and unpolluted in quality, a lower riparian owner has no right of action. For his right is to have the water undiminished in quantity and undefiled in quality, and that right is not infringed (*Kensit v. G. E. R. Co.*, 27 Ch. D. 122).

(3) And although there can be no *property* in water running through underground undefined channels, yet no one is entitled to pollute water flowing beneath another's land. Thus, in *Ballard v.*

Tomlinson (29 Ch. D. 115), where neighbours each possessed a well, and one of them turned sewage into his well, in consequence whereof the well of the other became polluted, it was held by Pearson, J., that no action lay; on the ground that, it being settled law that a landowner is entitled so to deal with underground water on his own land, as to deprive his neighbour of it entirely, it follows that he is equally entitled to render such water unfit for use by polluting it. This decision was, however, reversed on appeal. For (as was pointed out in a previous edition of this work issued while the appeal was pending) there is a considerable difference between intercepting water in which no property exists, on the one hand, and sending a new, foreign and deleterious substance on to another's property, on the other hand. The immediate *damnum* (viz., the pollution of the water) might possibly be no legal *damnum*; but allowing sewage to escape into another's property (for *cujus est solum, ejus est usque ad inferos*) is of itself an *injuria* which needs no *damnum*.

ART. 86.—*Use of Water Rights so as to cause Floods.*

(1) If by means of impediments placed in or across a stream a riparian proprietor causes the stream to flood the lands of a proprietor higher up the stream, he will be liable for damages resulting therefrom.

(2) If a higher proprietor collects water and

pours it into the watercourse in a body, and so floods the lands of a proprietor lower down the stream, he will be liable for damage resulting therefrom (*Chasemore v. Richards*, 7 *H. L. C.* 349; *Sharpe v. Hancock*, 8 *Sc. N. R.* 46).

Exception. Prescriptive rights.—Rights in derogation of those of the other riparian proprietors may be gained by grant or prescription (*Acton v. Blundell*, 12 *M. & W.* 353; *Carlyon v. Lavington*, 1 *H. & N.* 784; 26 *L. J.*, *Ex.* 251).

ART. 87.—*Rights in Artificial Watercourses.*

An artificial watercourse may have been originally made under such circumstances, and have been so used, as to give all the rights which a riparian proprietor would have had if it had been a natural stream (*Sutcliffe v. Boothe*, 32 *L. J.*, *Q. B.* 136).

(1) Where a loop had been made in a stream, which loop passed through a field A., it was held that the grantee of A. became a riparian proprietor in respect of the loop (*Nuttall v. Bracewell*, *L. R.*, 2 *Ex.* 1).

(2) A natural stream was divided immemorially, but by artificial means, into two branches; one branch ran down to the river Irwell, and the other passed into a farm yard, where it supplied a watering trough, and the overflow from the trough was formerly dif-

fused over the surface and discharged itself by percolation. In 1847, W., the owner of the land on which the watering trough stood and thence down to the Irwell, connected the watering trough with reservoirs which he constructed adjacent to, and for the use of, a mill on the Irwell. In 1865, W. became owner of all the rest of the land through which this branch flowed. In 1867, he conveyed the mill, with all water rights, to the plaintiff. In an action brought by the plaintiff against a riparian owner on the stream above the point of division, for obstructing the flow of water, it was held that the plaintiff was entitled to maintain the action (*Holker v. Porrit*, L. R., 10 Ex. (Ex. Ch.) 59).

(3) But where the watercourse is merely put in for a temporary purpose, as for drainage of a farm, or the carrying off of water pumped from a mine, a neighbouring landlord, benefited by the flow from the drain or stream, cannot sue the farmer or mine owner for draining off the water, even after fifty years' enjoyment (*Greatrex v. Hayward*, 8 Ex. 291).

ART. 88.—*Disturbance of Private Rights of Way (a).*

Where one grants land to another, and there is no access to the land sold, except through other land of the grantor, or no

(a) The only right of way which calls for remark in an elementary work of this kind, is that which is said to arise by necessity.

access to the land retained, except through the land sold, the law implies, in the one case, a grant to the purchaser of a private right of way over the land retained, and in the other case, a reservation to the vendor of a private right of way over the land sold (*Gayford v. Moffat*, *L. R.*, 4 *Ch.* 133; *Pennington v. Galland*, 22 *L. J.*, *Ex.* 349), and any disturbance of such rights constitutes a tort. But when the necessity ceases the right ceases, but the right revives again when the necessity revives (*Holmes v. Goring*, 2 *Bing.* 76; *Pearson v. Spencer*, 1 *B. & S.* 584).

Therefore, when by a subsequent purchase a man can approach his land without going over that of his neighbour, his right to do so ceases; but upon the re-sale of such subsequent purchase the right revives.

ART. 89.—*Disturbance of Rights of Common.*

A person commits a tort :—

- (1) Where, having no right of common, he puts beasts on the land; or, having such right, he puts uncommonable ones on to it;
- (2) Where, being a commoner, he surcharges or puts more beasts on the

common than he is entitled to put ;
and

(3) Where he encloses or obstructs the common.

(1) The lord may by *prescription* put a stranger's cattle into the common, and also, by a like prescription for common appurtenant, cattle that are not commonable may be put into the common ; but, unless such prescription exists, the cattle of a stranger, or the uncommonable cattle of a commoner, may be driven off, or distrained damage feasant, or their owner may be sued either by the lord or a commoner.

(2) Surcharging generally happens where the right of common is appendant, that is to say, where the common is limited to beasts that serve the plough or manure the land, and are levant and couchant on the estate ; or where it is appurtenant, that is to say, where there is a right of depasturing a limited number of beasts upon the common, which number is taken to be the number which the land, in respect of which the common is appurtenant, is capable of supporting through the winter if cultivated for that purpose (*Can v. Lambert, L. R.*, 1 *Ex.* 168). A common in gross can only arise from express grant to a particular person and his heirs, and, having no connection with his land, the number of commonable beasts, unless expressly limited by the grant, is indefinite.

Common appendant and appurtenant being limitable by law, a commoner surcharging the common,

commits a wrong for which the lord may distrain the beasts surcharged, or bring an action, and any commoner may also bring an action, whether the surcharger be the lord or another commoner (*Steph. Comm., bk. v. ch. viii.*).

(3) **Obstruction.**—The common being free and open to all having commonable rights over it, it follows that when the owner of the land or some other person so encloses or otherwise obstructs a common that the commoner is precluded from enjoying the benefit to which he is by law entitled, the commoner may maintain an action (*City Commissioners of Sewers v. Glass, L. R., 19 Eq. 134*). This may happen, either by enclosing the land, or ploughing it up, or driving off the cattle, or making a warren and so stocking it that the rabbits eat up all the herbage. The lord may, however, lawfully make a warren if the rabbits be so kept under as not to occasion this injury (*Bullen v. Langdon, C. Eliz. 876*).

Other disturbances.—There are certain other kinds of disturbance, for which I must refer to larger works. Such are disturbance of patronage, pews, franchise, and tenure.

ART. 90.—*Remedy for Nuisances by Abatement.*

(1) The law gives a peculiar remedy for nuisances by which a man may right himself:

This remedy is called abatement, and consists in the removal of the nuisance.

(2) A nuisance may be abated by the party aggrieved thereby, so that he commits no riot in the doing of it, nor occasions, in the case of a private nuisance, any damage beyond what the removal of the inconvenience necessarily requires (*Steph. Comm., bk. v. ch. i.*); but a man cannot enter a neighbour's land to prevent an apprehended nuisance (a).

(1) Thus, if my neighbour build a wall and obstruct my ancient lights, I may, after notice and request to him to remove it, enter and pull it down (*R. v. Rossucll, 2 Salk. 459*); but this notice should always be given (*Davies v. Williams, 16 Q. B. 556*).

(2) But where the plaintiff had erected scaffolding in order to build, which building when erected would have been a nuisance, and the defendant entered and threw down the scaffolding, such entry was held wholly unjustifiable (*Norris v. Baker, 1 Roll. Rep. 393, fol. 15*).

(3) Obstructions to watercourses may be abated by the party injured, whether by diminution or flooding (*Roberts v. Rose, L. R., 1 Ex. 82*).

(4) A commoner may abate an encroachment on his common, such as a house (*Davies v. Williams,*

(a) It is generally very imprudent to attempt to abate a nuisance. It is far better to apply for an injunction.

supra), or fence obstructing his right (*Mason v. Caesar*, 2 *Mod.* 66); but he cannot abate a warren however great a nuisance, but must appeal to a court of justice (*Cooper v. Marshall*, 1 *Burr.* 226).

ART. 91.—*Remedy of Reversioners for Nuisances.*

Whenever any wrongful act is necessarily injurious to the reversion to land, or has actually been injurious to the reversionary interest, the reversioner may sue the wrongdoer (*Bedingfield v. Onslow*, 1 *Saund.* 322).

(1) Thus, opening a new door in a house may be an injury to the reversion, even though the house is none the worse for the alteration; for the mere alteration of property may be an injury (*Young v. Spencer*, 10 *B. & C.* 145, 152).

(2) So if a trespass be accompanied with an obvious denial of title, as by a public notice, that would probably be actionable (see judgment, *Dobson v. Blackmore*, 9 *Q. B.* 991).

(3) So, the obstruction of an incorporeal right, as of way, air, light, water, &c., may be an injury to the reversion (*Kidgell v. Moore*, 9 *C. B.* 364; *Met. Ass. Co. v. Petch*, 27 *L. J., C. P.* 330; *Greenslade v. Halliday*, 6 *Bing.* 379).

(4) But an action will not lie for a trespass or nuisance of a mere transient and temporary character (*Baxter v. Taylor*, 4 *B. & Ad.* 72). Thus, a nuisance arising from noise or smoke will not support an action by

the reversioner (*Mumford v. O. W. & W. R. Co.*, 26 L. J., Ex. 265; *Simpson v. Savage*, 26 L. J., C. P. 50). Some injury to the reversion must always be proved, for the law will not assume it from any acts of the defendant (*Kidgell v. Moore*, *sup.*).

CHAPTER IV.

OF TORTS FOUNDED ON THE DIRECT INFRINGEMENT
OF PRIVATE RIGHTS.

Introductory.—Hitherto we have been considering torts in which there was a wrongful act distinct from the damage to the plaintiff, and which might, if it had not been followed by damage, have given no right of action. Such wrongful acts depend, as we have seen, upon (1) a state of mind from which the law infers malice, that is, a conscious, or intentional violation of law to another's prejudice; or (2) a course of conduct from which the law infers negligence, or reckless indifference to the rights of others; or (3) an usurpation of powers, or an abstention from duties in relation to property of the defendant or the public, which may or may not cause private damage.

The class of torts about to be considered, however, differs from all the foregoing, by reason of the wrongful act and the damage resulting from it being practically indivisible. These are what are spoken of in many text books as *injuriæ*. They require no proof of intention to commit a wrong, and no proof of damage resulting from it. The mere fact that a private right has been infringed *without lawful excuse*,

constitutes of itself both wrongful act and damage, and gives the party affronted a right of action, even although his actual surroundings may have been improved rather than depreciated.

Such torts usually consist of infringements of the rights of liberty, of immunity from assault and battery, or of the enjoyment of real or personal property, including in the latter term incorporeal property consisting of monopolies or rights of exclusive user in relation to patented inventions, trade marks, designs, and literary productions.

Section I.

OF FALSE IMPRISONMENT.

ART. 92.—*Definition.*

False imprisonment consists in the imposition of a total restraint for some period, however short, upon the liberty of another, without sufficient legal authority (*Bird v. Jones*, 7 Q. B. 743). The restraint may be either physical or by a mere show of authority.

Moral restraint.—Imprisonment does not imply incarceration, but any restraint by force or show of

authority. For instance, where a bailiff tells a person that he has a writ against him, and thereupon such person peaceably accompanies him, that constitutes an imprisonment (*Grainger v. Hill*, 4 *Bing. N. C.* 212; see *Harrey v. Mayne*, 6 *Ir. R.*, *C. L.* 417). But some total restraint there *must* be, for a partial restraint of locomotion in a particular direction, (as by preventing the plaintiff from exercising his right of way over a bridge,) is no imprisonment; for no restraint is thereby put upon his liberty (*Bird v. Jones*, *sup.*).

The rules which apply to imprisonments by private persons, and those which apply to imprisonments by judges and other magistrates, are necessarily different. It will be therefore more convenient to consider them separately.

SUB-SECT. 1.—OF IMPRISONMENTS BY PRIVATE PERSONS
AND CONSTABLES.

ART. 93.—*General Immunity from Imprisonment.*

(1) A person who arrests or imprisons another without a legal, and legally executed, warrant, commits a tort, except in certain exceptional cases.

(2) Where an arrest can only lawfully be made by warrant, the person arresting must have it with him at the time, ready to be

produced if demanded (*Gilliard v. Loxton*, 31 *L. J., M. C.* 123).

Thus, for either a constable or private person to arrest a person who is suspected of a mere misdemeanour, or a person who has committed a past assault, or the like, without the warrant of a magistrate, is a false imprisonment, for which the party making the arrest will be liable, even although the party arrested might have been properly arrested, had a warrant been obtained.

Exceptional cases justifying arrests by private persons.—In the following cases, a private citizen may arrest another with impunity, viz.:—

(1) **Bail.**—A person who is bail for another may always arrest and render him up in his own discharge (*Exp. Lyne*, 3 *Stark.* 132).

(2) **Felons.**—A treason or felony having *been actually committed*, a private person may arrest one *reasonably*, although erroneously, suspected by him; but the suspicion must not be mere surmise (*Beckwith v. Philby*, 6 *B. & C.* 635). So a person may arrest another in order to prevent him from committing a felony.

In an action for false imprisonment, where the defendant, in order to justify himself, must prove that a felony was in fact committed, and where it appears that if it were committed it could only have been committed by the plaintiff, the fact that the latter has been tried for the alleged felony and acquitted, does not estop the defendant from giving evidence that he did really commit it. For the verdict in the criminal

trial was *res inter alios acta*, and could not reasonably be held binding on the defendant in a distinct proceeding (*Cahill v. Fitzgibbon*, 16 *L. R. Ir.* 371).

(3) **Breakers of peace.**—A private person may and ought to arrest one committing, or about to commit, a breach of the peace, but not if the affray be over, and not likely to recur (*Timothy v. Simpson*, 1 *Cr. M. & R.* 757).

(4) **Night offenders.**—Any person may arrest and take before a justice one *found committing* an indictable offence between 9 p.m. and 6 a.m. (14 & 15 Vict. c. 19, s. 11).

(5) **Malicious injurers.**—The owner of property or his servant may arrest and take before a magistrate any one *found committing* malicious injury to *such* property (14 & 15 Vict. c. 19, s. 11; 24 & 25 Vict. c. 97).

(6) **Offering goods for pawn.**—A private person, to whom goods are offered for sale or pawn, may, if he has reasonable ground for suspecting that an offence against the Larceny Amendment Acts (24 & 25 Vict. c. 96; 35 & 36 Vict. c. 93, s. 34) has been committed with respect to them, arrest the person offering them, and take him and the property before a magistrate.

(7) **Vagrants.**—Any person may arrest, and take before a magistrate, one *found committing* an act of vagrancy (5 Geo. 4, c. 83).

N.B. Such acts are soliciting alms by exposure of wounds, indecent exposure, false pretences, fortune-telling, betting, gaming in the public streets, and

many other acts, for which I must refer to the 4th section of the Act.

(8) **Brawlers.**—A churchwarden may apprehend, and take before a magistrate, any person disturbing divine service (14 & 15 Vict. c. 19, s. 11).

(9) **Other cases depending upon relationship.**—Officers in the army or navy may imprison their subordinates. So a parent may lock up his child, and perhaps a husband his wife, and a master his apprentice.

(10) **Particular exceptions.**—In London, the owner of property may arrest any one *found* committing any indictable offence, or misdemeanour in respect to such property, punishable upon summary conviction.

Most private Railway Acts, too, give power to officers of the company to detain unknown offenders against the Act.

Ship masters have special powers of imprisoning crew and passengers.

Special powers, too, are frequently given to the police of certain towns and cities, by their Local Acts.

Under the above exceptions numbered 4, 5, and 7, it is no excuse to prove the commission of the offence immediately *before* the arrest, for the arrest must be made *in the course of the commission* of the offence (*Simmon v. Milligan*, 2 C. B. 533).

Exceptional cases justifying arrests by constables without warrant.—Of course a constable can arrest a person in his capacity of a private citizen wherever a private citizen could do so. But in addition to such cases, he has greater powers conferred upon him than

ordinary individuals, in order that he may efficiently perform his duty as a guardian of the public peace.

(1) **Cases of suspected felony.**—As we have seen, a private person can only arrest a suspected felon in cases where a felony has actually been committed by *some one*; and if it should turn out that no such felony was ever committed, he will be liable however reasonable his suspicions may have been. It would, however, be obviously absurd to require a constable to satisfy himself at his peril that a felony had been in fact committed, before acting; and consequently the law provides that a constable may make an arrest merely upon reasonable suspicion that a felony has been committed, and that the party arrested was the doer; and even though it should turn out eventually that no felony has been committed he will not be liable (*Marsh v. Loader*, 14 C. B., N. S. 535; *Griffin v. Coleman*, 28 L. J., Ex. 134). The suspicion, however, must be a reasonable one, or the constable will be liable. Thus, a person told the defendant, a constable, that a year previously he had had his harness stolen, and that he now saw it on the plaintiff's horse, and thereupon the defendant went up to the plaintiff and asked him where he got his harness from, and the plaintiff making answer that he had bought it from a person unknown to him, the constable took him into custody, although he had known him to be a respectable householder for twenty years. It was held that the constable had no reasonable cause for suspecting the plaintiff, and was consequently liable for the false imprisonment (*Hogg v. Ward*, 27 L. J. Ex. 443).

But where one man falsely charges another with having committed a felony, and a constable, at and by his direction, takes that other into custody, the party making the charge, and not the constable, is liable (*Davies v. Russell*, 2 M. & P. 607). "It would be most mischievous," Lord Mansfield remarks, "that the officer should be bound first to try, and at his peril exercise his judgment as to the truth of the charge. He that makes the charge alone is answerable" (*Griffin v. Coleman*, 4 H. & N. 265).

(2) **Breakers of peace.**—A constable may and ought to arrest one committing, or about to commit, a breach of the peace, even after the affray (so that it be immediately after), in order to take the offender before a magistrate (*R. v. Light*, 27 L. J. M. C. 1).

(3) **Malicious injurers.**—A constable may arrest and take before a magistrate anyone *found committing* malicious injury to property (14 & 15 Vict. c. 19, s. 11; 24 & 25 Vict. c. 97).

(4) **Brawlers.**—A constable may arrest and take before a magistrate anyone interrupting divine service (14 & 15 Vict. c. 17, s. 11).



SUB-SECT. 2.—OF IMPRISONMENT BY JUDICIAL OFFICERS.



ART. 94.—*General Authority of Judicial Officers.*

(1) No judicial officer, invested with authority to imprison, is liable to an action for a

wrongful imprisonment, unless he acted beyond his jurisdiction (*Doswall v. Impey*, 1 B. & C. 169; *Kemp v. Neville*, 10 C. B., N. S. 523): not even though he imprisons the plaintiff maliciously (*Reon v. Smith*, 18 C. B. 126; *Dawkins v. Paulet*, L. R., 5 Q. B. 94).

(2) In order to constitute a jurisdiction, such officer must have before him some suit, complaint, or matter in relation to which he has authority to inflict imprisonment or arrest.

(1) In the case of *Scott v. Stansfield* (L. R., 3 Ex. 220), which, though an action of slander, will very well repay a careful perusal, Kelly, C. B., remarks, "It is essential in all courts, that the judges, who are appointed to administer the law, should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences. How could a judge so exercise his office, if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury, whether a matter, on which he has commented judicially, was or was not relevant to the case before him? Again, if a question arose as to the *bona fides* of the judge,

it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. It is impossible to over-estimate the inconvenience of such a result. For these reasons I am most strongly of opinion that no such action as this can under any circumstances be maintainable" (a).

(2) Where a court has jurisdiction of a matter before it, but acts erroneously, the parties suing (unless they acted maliciously), the court itself, and the officers executing its orders or warrants, will be protected from any action at the suit of a person arrested. But where it has no jurisdiction all these parties may be liable (*Comyn, Dig. tit. County Court*, 8; *Houlden v. Smith*, 14 Q. B. 841; *West v. Smallwood*, 3 M. & W. 421; *Wingate v. Waite*, 6 M. & W. 746; *Brown v. Watson*, 23 L. T. 745).

(a) Whether a magistrate would be equally exempted from liability in cases where he had acted maliciously, does not seem to have been decided. It will at once appear that the judgment of the Chief Baron, which I have cited at considerable length on account of its lucid enunciation of the principles on which this exception is based, is broad enough to include actions brought against a justice of the peace. At the same time, it must be admitted the first section of Jervis' Act (11 & 12 Vict. c. 44), as has been pointed out by Mr. Roscoe in his *Law of Nisi Prius Evidence*, would seem to imply that such an action could be supported. There the matter rests, but I confess I have little doubt, should the question ever arise, that, provided he acts within his jurisdiction, a magistrate is no more answerable (by action, that is to say) for a malicious act, than is a judge of a county court or of the High Court. In this opinion the learned author above cited seems to concur.

(3) So where a magistrate acts without those circumstances which must concur to give him jurisdiction he will be liable (*Morgan v. Hughes*, 2 T. R. 225). But an information brought before a magistrate, charging an offence within his cognizance, gives him jurisdiction (*Cave v. Mountain*, 1 M. & G. 257).

ART. 95.—*Primâ facie Jurisdiction sufficient to excuse Judicial Officer.*

The judge of an inferior court, having a *primâ facie* jurisdiction over a matter, is not responsible for a false imprisonment committed on the faith of such *primâ facie* jurisdiction, if, by reason of something of which he could have no means of knowledge, he really has no jurisdiction (*Calder v. Halkett*, 3 Moore, P. C. C. 28).

Thus if, through an erroneous statement of facts, a person be arrested under process of an inferior court, for a cause of action not accruing within its jurisdiction, no action lies against the judge or officer of the court, but against the plaintiff only (*Oliett v. Bessey*, 2 W. Jones, 214).

ART. 96.—*Power to imprison for Contempt of Court.*

The superior courts of law and equity have jurisdiction to punish by commitment

for any insult offered to them, and any libel upon them, or any contemptuous or improper conduct committed by any person with respect to them; but inferior courts of record have power only to commit for contempts committed in court.

(1) During the pendency of a suit in a superior court, the publisher of a newspaper commits a contempt, if he publishes extracts from affidavits with comments upon them (*Tichborne v. Mostyn*, *L. R.*, 7 *Eq.* 56).

(2) Where an indictment has been removed into the Queen's Bench Division, and a day appointed for trial, the holding of public meetings, alleging that the defendant is not guilty, and that there is a conspiracy against him, and that he cannot have a fair trial, is a contempt of court (*Onslow's and Whalley's case*, *Reg. v. Castro*, *L. R.*, 9 *Q. B.* 219).

(3) A solicitor is guilty of a contempt of court in writing, for publication, letters tending to influence the result of a suit (*Davis v. Eley*, *L. R.*, 7 *Eq.* 49).

(4) It seems that a judge of a county court has power only to commit for contempts committed before the court and whilst it is sitting. (See *R. v. Leroy*, *Weekly Notes*, Feb. 8, 1873.)

(5) A justice of the peace may commit one who calls him, in court, a liar (*Rex v. Revel*, 1 *Str.* 421).

ART. 97.—*Power of Magistrates to imprison.*

(1) If a felony, or breach of the peace, be committed in view of a justice, he may personally arrest the offender or command a bystander to do so, such command being a good warrant. But, if he be not present, he must issue his written warrant to apprehend the offender (2 *Hale, Pl. Cr.* 86).

(2) Where a justice acts in a matter without any, or beyond his, jurisdiction, a person injured by any conviction or order issued by such justice in such matter cannot maintain an action in respect thereof, until such conviction shall have been quashed by the proper tribunal in that behalf; nor for anything done under a warrant followed by a conviction or order, until such conviction be quashed; nor at all for anything done under a warrant for an indictable offence, if a summons had been previously served and not obeyed. (See 11 & 12 Vict. c. 44.)

Constables executing the warrants of justices issued without jurisdiction are specially protected by 24 Geo. 2, c. 44, ss. 6, 8, from any action, unless they have refused for six days after written demand to produce the warrant.

It may be also observed that, by sect. 9, a month's notice is required to be given before commencing an

action against a justice for any act done in the execution of his office; and by 11 & 12 Vict. c. 44, s. 11, if after such notice, and before the commencement of the action, the justice tender a sum of money in amends, then if the jury shall be of opinion that such sum is sufficient, they shall give their verdict for the defendant. A justice acting maliciously is nevertheless entitled to notice, and to tender amends (*Leary v. Patrick*, 15 Q. B. 272).

ART. 98.—*Limitation.*

No action can be brought for false imprisonment except within four years next after the cause of action arose. But as imprisonment is a continuing tort, the period runs from the last day of the imprisonment, and not from the first.

Exceptions.—(1) **Justices.**—An action against a justice of the peace for anything done by him in the execution of his office, must be commenced within six calendar months next after the commission of the act complained of (11 & 12 Vict. c. 44, s. 8).

(2) **Constables.**—Various Acts for the appointment and regulation of police, limit the period within which actions may be brought against them. The following are the most important: 10 Geo. 4, c. 44, relating to the Metropolitan police, by sect. 41 enacts that all actions for anything done in pursuance of the Act shall be (*inter alia*) commenced within six calendar months, and that a month's written notice

shall be given to them; and the same provision is extended to special constables and county policemen by 1 & 2 Will. 4, c. 41, and 2 & 3 Vict. c. 93, respectively. Borough constables are protected in a similar manner by 5 & 6 Will. 4, c. 76, s. 113: and sect. 76 of the same Act enacts that men sworn as such shall not only within the borough, but also within the county in which the same is situated, and in any county within seven miles of such borough, have all such powers and privileges, and be liable to all such duties and responsibilities, as any constable at the time of the passing of that Act had or thereafter might have within his constablewick.

Constables may also pay money into court. (See 11 & 12 Vict. c. 44, ss. 9, 11.)

All such actions against justices and constables must (by various Acts) be laid in the county in which the trespass was committed.

Habeas corpus.—In addition to the remedy by action, the law affords a peculiar and unique summary relief to a person wrongfully imprisoned, viz., the writ of *habeas corpus ad subjiciendum*.

This writ may be obtained by motion made to any superior court, or to any judge when those courts are not sitting, by any of her Majesty's subjects. The party moving must show probable cause that the person whose release he desires is wrongfully detained. If the court or judge thinks that there is reasonable ground for suspecting illegality, the writ is ordered to issue, commanding the detainer to produce the party detained in court on a specified day, when the question is summarily determined. If the

detainer can justify the detention, the prisoner is remitted to his custody. If not, he is discharged, and may then have his remedy by action. (See 31 Car. 2, c. 2; and 56 Geo. 3, c. 100.)

Section II.

OF ASSAULT AND BATTERY.

Causing Death.—Direct personal injuries causing death are crimes of a most heinous nature. They rather come, therefore, under the ordinances of the criminal than of the civil law. Putting these aside, all other direct bodily injuries may be considered as either assaults or more or less aggravated forms of battery.

ART. 99.—*Definition of Assault.*

An assault is an attempt or offer to do harm to the person of another, which might have succeeded if persevered in, or would have succeeded but for some accident.

(1) Thus, if one make an attempt, and have at the time of making such attempt a present *prima facie* ability to do harm to the person of another, although no harm be actually done, it is nevertheless an assault. For example, menacing with a stick a person within

reach thereof, although no blow be struck (*Read v. Coker*, 13 C. B. 850); or striking at a person who wards off the blow with his umbrella or walking stick, would constitute assaults.

(2) But a mere verbal threat is no assault: nor is a threat consisting, not of words but gestures, unless there be a present ability to carry it out. This was illustrated by Pollock, C. B., in *Cobbet v. Grey* (4 Exch. 744). "If," said that learned judge, "you direct a weapon, or if you raise your fist within those limits which give you the means of striking, that may be an assault; but if you simply say, at such a distance as that at which you cannot commit an assault (a), 'I will commit an assault,' I think that is not an assault."

(3) To constitute an assault there must be an attempt. Therefore, if a man says that he would hit another were it not for something which withholds him, that is no assault, as there is no apparent attempt (*Tuberville v. Savage*, 1 Mod. 3).

(4) For the same reason shaking a stick in sport at another is not actionable (see *Christopherson v. Bare*, 11 Q. B. 477).

ART. 100.—*Definition of Battery.*

Battery consists in touching another's person hostilely or against his will, however slightly (*Rawlings v. Till*, 3 M. & W. 28).

This touching may be occasioned by a missile or

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any instrument set in motion by the defendant, as by throwing water over the plaintiff (*Russell v. Horne*, 8 A. & E. 602), or spitting in his face, or causing another to be medically examined against his or her will (*Latter v. Braddell*, 29 W. R. 239). In accordance with the rule, a battery must be involuntary: therefore a voluntarily suffered beating is not actionable; for *volenti non fit injuria* (*Christopherson v. Bare*, 11 Q. B. 477). Merely touching a person in order to engage his attention is no battery (*Couard v. Baddeley*, 28 L. J., Ex. 261).

Wounding and Maiming.—If the violence be so severe as to wound, the damages will be greater than those awarded for a mere battery; so, also, if the hurt amount to a mayhem (that is, a deprivation of a member serviceable for defence in fight); but otherwise the same rules of law apply to these injuries as to ordinary batteries.

ART. 101.—*General Liability for Assault and Battery.*

Any person who commits an assault or battery without lawful authority commits a tort.

Exceptions.—(1) **Self-Defence.**—A battery is justifiable if committed in self-defence. Such a plea is called a plea of “son assault demesne.” But to support it, the battery so justified must have been committed in actual defence, and not afterwards and in mere retaliation (*Cockroft v. Smith*, 11 Mod. 43). Neither does every common battery excuse a mayhem.

As, if "A. strike B., B. cannot justify drawing his sword, and cutting off A.'s hand," unless there was a dangerous scuffle, and the mayhem was inflicted in self-preservation (*Cooper v. Beale*, *L. Raym.* 177).

(2) **Defence of property.**—A battery committed in defence of real or personal property is justifiable.

Thus, if one forcibly enters my house, I may forcibly eject him; but if he enters quietly, I must first request him to leave. If after that he still refuse, I may use sufficient force to remove him, in resisting which he will be guilty of an assault (*Wheeler v. Whiting*, 9 C. & P. 265).

So, a riotous customer may be removed from a shop after a request to leave. For the same reason, where the violence complained of consisted in the defendant attempting to take away certain rabbits from the plaintiff, which did not belong to him but to the defendant's master, and which the plaintiff had refused to give up, the defendant was held to have a good defence to an action of assault (*Blades v. Higgs*, 10 C. B., N. S. 713; affirmed, 11 H. L. C. 621).

(3) **Correction of pupil.**—A father or master may moderately chastise his son, pupil, or apprentice (*Penn v. Ward*, 2 Cr., M. & R. 338).

Other exceptions.—An assault may be committed in order to stop a breach of the peace; to arrest a felon, or one who (a felony having actually been committed) is reasonably suspected of it; in arresting a person *found committing* a misdemeanor between the hours of 9 p.m. and 6 a.m.; and in arresting a malicious trespasser, or vagrant under the Vagrancy Act.

A churchwarden or beadle may eject a disturber

of a congregation, and a master of a ship may assault and arrest an unruly passenger. So assaults and batteries, committed under legal process, are justifiable; but a constable ought not *unnecessarily* to handcuff an unconvicted prisoner, and if he do so he will be liable to an action (*Griffin v. Coleman*, 28 L. J., Ex. 134) (a). And, generally, where force is justifiable, no greater force can be lawfully used than the occasion requires.

ART. 102.—*Institution of Criminal Proceedings
endangers Right of Action.*

Where any person unlawfully assaults or beats another, two justices of the peace, upon complaint of the party aggrieved, may hear and determine such offence, and if they deem the offence not to be proved, or find it to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they must forthwith make out a certificate stating the fact of such dismissal, and deliver the same to the party charged; and if any person shall have obtained such certificate, or *having been convicted shall have suffered the punishment inflicted*,

(a) The same rule as to notice, tender of amends, and limitation applies to batteries committed by constables in the execution of their duty as in false imprisonment.

he shall be released from all further or other proceedings, civil or criminal, for the same cause (24 & 25 Vict. c. 100, ss. 42—45).

(1) As to what constitutes a "hearing," see *Vaughton v. Bradshaw*, 9 C. B., N. S. 103. The accused being ordered by the magistrate to enter into recognizances to keep the peace and to pay the recognizance fee, will not constitute a bar to an action (*Hartley v. Hindmarsh*, L. R., 1 C. P. 553).

(2) The granting a certificate by a magistrate where the complaint is dismissed, is not merely discretionary. A magistrate is bound, on proper application, to give the certificate mentioned in the section (*Hancock v. Simes*, 28 L. J., M. C. 196); and, if he refuses to do so, may be compelled by mandamus (*Coster v. Hetherington*, 28 L. J., M. C. 198).

(3) The words "from all further or other proceedings against the defendant, civil or criminal, for the same cause," include all proceedings against the defendant arising out of the same assault, whether taken by the prosecutor or by any other person consequentially aggrieved thereby (*Masper and wife v. Brown*, 1 C. P. Div. 97).

(4) If a person is charged with an assault, and the complaint is dismissed and a certificate given him, he cannot avail himself of the defence under the statute, when sued on for the tort, unless he specially pleads such defence (*Harding v. King*, 6 C. & P. 427).

ART. 103.—*Amount of Damages.*

In assessing what amount of damages may be recovered for an assault, or battery, the time when, and the place in which, the assault took place should be taken into consideration.

Thus, an assault committed in a public place calls for much higher damages than one committed where there are few to witness it. "It is a greater insult," remarks Bathurst, J., in *Tullidge v. Wade* (3 Wils. 19), "to be beaten upon the Royal Exchange than in a private room."

ART. 104.—*Limitation.*

No action can be brought for assault or battery except within four years next after the cause of action arose.

Section III.

OF TRESPASS TO LAND AND DISPOSSESSION.

SUB-SECT. 1.—OF TRESPASS QUARE CLAUSUM FREGIT.

ART. 105.—*Definition.*

Trespass *quare clausum fregit*, is a trespass committed in respect of another man's land, by entry on the same without lawful authority. It constitutes a tort without proof of actual damage.

(1) Thus, driving nails into another's wall, or placing objects against it, are trespasses (*Laurence v. Obee*, 1 Stark. 22; *Gregory v. Piper*, 9 B. & C. 591).

(2) So, it is a trespass to allow one's cattle to stray on to another's land, unless there is contributory misconduct on his part, such as keeping in disrepair a hedge which he is bound by prescription or otherwise to repair (*Lee v. Riley*, 34 L. J., C. P. 212); but, if no such duty to repair exists, the owner of cattle is liable for their trespasses even upon uninclosed land (*Boyle v. Tamlin*, 6 B. & C. 337), and for all naturally resulting damage. But see *Sanders v. Teape*, 51 L. T. 263, as to trespasses by dogs.

(3) Where one has authority to use another's land for a particular purpose any user going beyond the authorized purpose is a trespass. Thus, where the

lord of a manor entitled by custom to convey minerals *gotten within the manor* along subterranean passages under the plaintiff's land, brought thereunder minerals from mines gotten outside the manor, it was held to be a trespass (*Eardley v. Lord Granville*, 24 *W. R.* 528).

Exceptions.—In the following cases a person has lawful authority to enter upon another's land :—

(1) **Retaking goods.**—If one takes another's goods on to his land, the latter may enter and retake them (*Patrick v. Colerick*, 3 *M. & W.* 485).

(2) **Cattle.**—If cattle escape on to another's land through the non-repair of a hedge which the latter is bound to repair, the owner of the cattle may enter and drive them out (see *Faldo v. Ridge*, *Yelv.* 74).

(3) **Distraining for rent.**—So a landlord may enter his tenant's house to distrain for rent, or an officer to serve a legal process (*Keane v. Reynolds*, 2 *E. & B.* 748); but he may not break open the outer door of a house.

(4) **Reversioner inspecting premises.**—A reversioner of lands may enter, in order to see that no waste is being committed.

(5) **Escaping danger.**—A trespass is justifiable if committed in order to escape some pressing danger, or in defence of goods.

(6) **Grantee of easement.**—And the grantee of an easement may enter upon the servient tenement, in order to do necessary repairs (*Taylor v. Whitehead*, 2 *Doug.* 745).

(7) **Public rights.**—Land may be entered under the authority of a statute (*Beaver v. Mayor, &c. of*

Manchester, 26 *L. J., Q. B.* 311), or in exercise of a public right, as the right to enter an inn, provided there is accommodation (*Dansey v. Richardson*, 3 *E. & B.* 1859).

(8) *Liberum tenementum*.—Lastly, land may be entered on the ground that it is the defendant's. This latter, known as the plea of *liberum tenementum*, is generally pleaded in order to try the title to lands.

ART. 106.—*Trespassers ab initio*.

(1) Whenever a person has authority given him by law to enter upon lands or tenements for any purpose, and he goes beyond or abuses such authority, by doing that which he has no right to do, then, although the entry was lawful, he will be considered as a trespasser *ab initio*.

(2) But where authority is not given by the law, but by the party, and abused, then the person abusing such authority is not a trespasser *ab initio*.

(3) The abuse necessary to render a person a trespasser *ab initio* must be a misfeasance, and not a mere nonfeasance (*Six Carpenters' case*, 1 *Sm. L. C.* 132).

Thus, in the above case, six carpenters entered an inn and were served with wine, for which they paid. Being afterwards at their request supplied with more

wine, they refused to pay for it, and upon this it was sought to render them trespassers *ab initio*, but without success; for although they had authority by law to enter (it being a public inn), yet the mere non-payment, being a nonfeasance and not a misfeasance, was not sufficient to render them trespassers.

ART. 107.—*Possession necessary to maintain an Action for Trespass.*

(1) In order to maintain an action of trespass the plaintiff must be in the possession of the land; for it is an injury to possession rather than to title.

(2) The possession of land suffices to maintain an action of trespass against any person *wrongfully* entering upon it; and if two persons are in possession of land, each asserting his right to it, then the person who has the title to it is to be considered in actual possession, and the other person is a mere trespasser (*Jones v. Chapman*, 2 *Ex.* 821).

(3) Where a person is in possession of land the onus lies upon a *primâ facie* trespasser to show that he is entitled to enter (*Asher v. Whitlock*, *L. R.*, 1 *Q. B.* 1).

(1) Thus a person entitled to the possession of lands or houses, cannot bring an action of trespass against

a trespasser until he is in actual possession of them (*Ryan v. Clark*, 14 Q. B. 65); but when he has once entered, he acquires the actual possession, and such possession then dates back to the time of the legal commencement of his right of entry, and he may therefore maintain actions against intermediate and then present trespassers (*Anderson v. Radeliff*, 29 L. J., Q. B. 128; *Butcher v. Butcher*, 7 B. & C. 402).

(2) **Surface and subsoil in different owners.**—Where one parts with the right to the surface of land, retaining only the mines, he cannot maintain an action for trespass to the surface, because he is not in possession of it (*Cox v. Mouseley*, 5 C. B. 549); but he may for a trespass to the subsoil, as by digging holes, &c. (*Cox v. Gluc*, 17 L. J., C. P. 162). So the owner of the surface cannot maintain trespass for a subterranean encroachment on the minerals (*Reyse v. Powell*, 22 L. J., Q. B. 305), unless the surface is disturbed thereby.

(3) **Highways, &c.**—So, when one dedicates a highway to the public, or grants any other easement on land, possession of the soil is not thereby parted with, but only a right of way or other privilege granted (*Goodtitle v. Alder*, 1 Burr. 133; *Northampton v. Ward*, 1 Wills. 114). An action for trespasses committed upon it, as, for instance, by throwing stones on to it or erecting a bridge over it, may be therefore maintained by the grantor (*Every v. Smith*, 26 L. J., Ex. 345).

ART. 108.—*Trespasses by Joint Owners.*

Joint tenants, or tenants in common, can only sue one another in trespass for acts done by one inconsistent with the rights of the other (see *Jacobs v. Senard*, *L. R.*, 5 *H. L.* 464).

(1) **Ordinary joint holders.**—Among such acts may be mentioned the destruction of buildings (*Cresswell v. Hedges*, 31 *L. J.*, *Ex.* 49), carrying off of soil (*Wilkinson v. Hagarth*, 12 *Q. B.* 837), and expelling the plaintiff from his occupation (*Murray v. Hall*, 7 *C. B.* 441).

(2) **Co-owners of mines.**—But a tenant in common of a coal mine may get the coal, or license another to get it, not appropriating to himself more than his share of the proceeds; for a coal mine is useless unless worked (*Job v. Potton*, *L. R.*, 20 *Eq.* 84).

(3) **Party-walls.**—There is also one other important case of trespass between joint-owners, viz., that arising out of a party-wall. If one owner of the wall excludes the other owner entirely from his occupation of it (as, for instance, by destroying it, or building upon it), he thereby commits a trespass; but if he pulls it down for the purpose of re-building it, he does not (*Stedman v. Smith*, 26 *L. J.*, *Q. B.* 314; *Cubitt v. Porter*, 8 *B. & C.* 257).

ART. 109.—*Continuing Trespasses.*

Where a trespass is permanent and continuing, the plaintiff may bring his action as

for a continuing trespass, and claim damages for the continuation; and where after one action the trespass is still continued, other actions may be brought until the trespass ceases (*Bowyer v. Cook*, 4 C. B. 236).

ART. 110.—*Limitation.*

All actions for trespass must be commenced within six years next after the cause of action arose (21 Jac. 1, c. 16, s. 3).

Distress damage feasant.—It is convenient to mention here a peculiar remedy of landowners for trespasses committed by cattle, viz., by seizing the animals whilst trespassing, and detaining them until reasonable compensation is made (see *Green v. Duckett*, 11 Q. B. D. 275). This is not, however, available where animals are being actually tended; in such case the person injured must bring his action. A somewhat analogous remedy is allowed in the case of animals *feræ naturæ* reared by a particular person. In such cases the law, not recognizing any property in them, does not make their owner liable for their trespasses, but any person injured may shoot or capture them while trespassing. Thus, I may kill pigeons coming upon my land, but I cannot sue the breeder of them (*Hannam v. Mockett*, 2 B. & C. 939, per Bayley, J.).

SUB-SECT. 2.—OF DISPOSSESSION.

ART. 111.—*Definition.*

Dispossession or ouster consists of the wrongful withholding of the possession of land from the rightful owner.

Specific remedy.—Before the Judicature Act, 1873, the remedy for this wrong was by an action of ejectment for the actual recovery of the land, and since that statute it is by an action claiming the recovery of the land.

ART. 112.—*Onus of Proof of Title.*

The law presumes possession to be rightful, and therefore the claimant must recover on the strength of his own title, and not on the weakness of the defendant's (*Martin v. Strachan*, 5 T. R. 107).

(1) Thus, mere possession is *prima facie* evidence of title until the claimant makes out a better one (*Sweetland v. Webber*, 1 Ad. & E. 119).

(2) But where the claimant makes out a better title than the defendant, he may recover the lands, although such title may not be indefeasible. Thus, where one enclosed waste land, and died without having had twenty years' possession, the heir of his devisee was held entitled to recover it against a person who had entered upon it without any title (*Asher v. Whitlock*, L. R., 1 Q. B. 1).

(3) **Jus Tertii.**—Conversely, a man in possession who may not have an indefeasible title as against a third party, may yet have a better title than the actual claimant, and therefore he may set up the right of a third person to the lands, in order to disprove that of the claimant (*Doe d. Carter v. Bernard*, 13 Q. B. 945). But the claimant cannot do the same, for possession is, in general, a good title against all but the true owner (*Asher v. Whitlock*, *sup.*; *Richards v. Jenkins*, 17 Q. B. D. 544).

Exceptions.—(1) **Landlord and Tenant.**—Where the relation of landlord and tenant exists between the claimant and defendant, the landlord need not prove his title, but only the expiration of the tenancy, for a tenant cannot in general dispute his landlord's title (*Delaney v. Fox*, 26 L. J., C. P. 248), unless a defect in the title appears on the lease itself (*Saunders v. Merryweather*, 35 L. J., Ex. 115; *Doe d. Knight v. Smyth*, 4 M. & S. 347). But nevertheless he may show that his landlord's title has *expired*, by assignment, conveyance, or otherwise (*Doe d. Marriott v. Edwards*, 5 B. & Ad. 1065; *Walton v. Waterhouse*, 1 Wms. Saund. 418).

The principle does not extend to the title of the party through whom the defendant claims prior to the demise or conveyance to him. Thus, where the claimant claims under a grant from A. in 1818, and the defendant under a grant from A. in 1824, the latter may show that A. had no legal estate to grant in 1818 (*Doe d. Oliver v. Powell*, 1 A. & E. 531; 3 A. & E. 188).

(2) **Servants and Licensees.**—The same principle is

applicable to a licensee or servant, who is estopped from disputing the title of the person who licensed him (*Doe d. Johnson v. Baytop*, 3 A. & E. 188; *Turner v. Doe*, 9 M. & W. 645).

ART. 113.—*Character of Claimant's Estate.*

The claimant's title may be either legal or equitable (*semble*), provided that he is equitably better entitled to the possession than the defendant.

Before the Judicature Act, 1873, it was a well-established rule that a plaintiff in ejectment must have the legal estate (*Doe d. North v. Webber*, 5 Scott, 189). It is submitted, however, that as all branches of the High Court now take cognizance of equitable rights, an equitable estate will be alone sufficient (see and consider principles of *Walsh v. Lonsdale*, L. R., 21 Ch. Div. 9).

ART. 114.—*Limitation.*

No person can bring an action for the recovery of land or rent but within twelve years after the right to maintain such action shall have accrued to the claimant, or to the person through whom he claims (37 & 38 Vict. c. 57, s. 1; 3 & 4 Will. 4, c. 27, s. 2; *Brassington v. Llewellyn*, 27 L. J., Ex. 297).

Exceptions.—(1) **Disability.**—Where claimants are

under disability, by reason of infancy, coverture, or unsound mind, they must bring their action within six years after such disability has ceased: provided that no action shall be brought after thirty years from the accrual of the right (37 & 38 Vict. c. 57, ss. 3, 4, 5, and 3 & 4 Will. 4, c. 27, ss. 16, 17).

(2) **Acknowledgment of Title.**—When any person in possession of lands or rents gives to the person, or the agent of the person entitled to such lands or rents, an acknowledgment in writing, and signed, of the latter's title, then the right of such last-mentioned person accrues at, and not before, the date at which such acknowledgment was made, and the statute begins to run as from that date (*Ley v. Peter*, 27 L. J., Ex. 239).

(3) **Ecclesiastical Corporations.**—The period in the case of ecclesiastical and eleemosynary corporations is sixty years (3 & 4 Will. 4, c. 27, s. 29).

ART. 115.—*Commencement of Period of Limitation.*

The right to maintain ejectment accrues, (a) in the case of an estate in possession, at the time of dispossession or discontinuance of possession of the profits or rent of lands, or of the death of the last rightful owner (3 & 4 Will. 4, c. 27, s. 3); and, (b) in respect of an estate in reversion or remainder, or other future estate or interest, at the determination of the particular estate. But a

reversioner or remainderman must bring his action within twelve years from the time when the owner of the particular estate was dispossessed, or within six years from the time when he himself becomes entitled to the possession, whichever of these periods may be the longest (37 & 38 Vict. c. 57, s. 2).

(1) **Discontinuance.**—Discontinuance does not mean mere abandonment, but rather an abandonment by one followed by actual possession by another (see *Smith v. Lloyd*, 23 L. J., Ex. 194; *Cannon v. Rimington*, 12 C. B. 1). Therefore in the case of mines, where they do not belong to the surface-owner, the period cannot commence to run until some one actually works them; and even then it only commences to run *quâ* the vein actually worked (see *Low Moor Co. v. Stanley Co.*, 34 L. T., N. S. 186, 187; *Ashton v. Stock*, 6 Ch. Div. 726).

(2) **Continual assertion of claim.**—No defendant is deemed to have been in possession of land, merely from the fact of having entered upon it; and, on the other hand, a continual assertion of claim preserves no right of action (3 & 4 Will. 4, c. 27, ss. 10 and 11). Therefore, a man must actually bring his action within the time limited; for mere assertion of his title will not preserve his right of action after adverse possession for the statutory period.

Section IV.

OF TRESPASS TO AND CONVERSION OF
CHATTELS.ART. 116.—*General Rule.*

Every direct forcible injury, or act, disturbing the possession of goods without the owner's consent, however slight or temporary the act may be, is a trespass, whether committed by the defendant himself or by some animal belonging to him. And if the trespass amount to a deprivation of possession to such an extent as to be inconsistent with the rights of the owner (as by taking, using, or destroying them), it then becomes a wrongful conversion (*Fouldes v. Willoughby*, 8 M. & W. 540; *Burroughs v. Bayne*, 29 L. J., Ex. 185).

(1) Thus, beating the plaintiff's dogs is a trespass (*Dand v. Sexton*, 3 T. R. 37). And so it was held to be a trespass where the defendant's horse injured the plaintiff's mare, by biting and kicking her *on the plaintiff's land* without evidence of *scienter* (*Ellis v. Loftus Iron Co.*, L. R., 10 C. P. 10; but see *Sanders v. Teape*, 51 L. T., N. S. 263).

(2) The innocence of the trespasser's intentions is immaterial. Thus, where the sister-in-law of A., immediately after his death, removed some of his jewelry, from a drawer in the room in which he had died, to a cupboard in another, in order to insure its

safety, and the jewelry was subsequently stolen, it was held that the sister-in-law had been guilty of a trespass, in the absence of proof that her interference was reasonably necessary, and was liable for the loss (*Kirk v. Gregory*, 1 *Ex. D.* 55).

(3) So, if one lawfully having the goods of another for a particular purpose, destroy them, he is guilty of trespass and conversion (*Cooper v. Willomat*, 1 *C. B.* 692).

(4) So, if a sheriff sells more goods than are sufficient to satisfy an execution, he will be liable for a conversion of those in excess (*Aldred v. Constable*, 6 *Q. B.* 381).

(5) So, if A. starts a hare in the ground of B., and hunts it and kills it there, it is a trespass; for so long as the hare is upon B.'s land it is B.'s property (*Sutton v. Moody*, 1 *Ld. Raym.* 250). So, rabbits bred in a warren are the property of the breeder so long as they stay in his land, but not after they have left it (*Hadesden v. Gryssel*, *Cro. Jac.* 195).

(6) **Conversion by innocent purchaser.**—The purchaser of a chattel takes it, as a general rule, subject to what may turn out to be defects in the title. By a purchase in market overt, however, the title obtained is good as against all the world (except in the case mentioned at the end of this section). If not so purchased, though purchased *bonâ fide*, the title obtained may not be good as against the real owner. But where the original owner has parted with a chattel to A. upon an *actual* contract, though there may be circumstances which enable that owner to set aside that contract, the *bonâ fide* purchaser from A. will obtain an indefeasible title, because,

until the contract is set aside, A. is in law the owner. The question, therefore, in many such cases will be, was there a contract between the real owner and A. ? (*Cundy v. Lindsay*, 3 *App. Cas.* 459.) Thus, L. was a manufacturer in Ireland: Alfred Blenkarn, who occupied a room in a house looking into Wood Street, Cheapside, wrote to L., proposing a considerable purchase of L.'s goods, and in his letters used this address, "37, Wood Street, Cheapside," and signed the letters (without any initial for a Christian name) with a name so written that it appeared to be "Blenkiron & Co." There was a respectable firm of that name carrying on business in Wood Street. The goods were sent there and the correspondence was all addressed to Blenkiron & Co., 37, Wood Street, and Blenkarn disposed of the goods to the defendant, a *bonâ fide* purchaser: Held, that no contract was ever made with Blenkarn, and that even a temporary property never passed to him, so that he never obtained such a temporary property which he could pass to the defendant (*Cundy v. Lindsay*, *sup.*).

Exceptions.—(1) **Plaintiff's fault.**—It is a good justification that the trespass was the result of the plaintiff's own negligent or wrongful act. Thus, if he place his horse and cart so as to obstruct my right of way, I may remove it, and use, if necessary, force for that purpose (*Slater v. Swann*, 2 *St.* 892). So, if his goods or cattle trespassing on my land get injured, he has no remedy (*Turner v. Hunt, Brownl.* 220); unless I use an unreasonable amount of force,

as, for instance, by chasing trespassing sheep with a mastiff dog (*King v. Rose*, 1 *Freem.* 347).

So, if a man wrongfully takes my garment and embroiders it with gold, I may retake it; and "if J. T. have a heap of corn, and J. D. will intermingle his corn with the corn of J. T., the latter shall have all the corn, because this was done by J. D. of his own wrong" (Coke, C. J., in *Ward v. Eyre*, 2 *Bulstr.* 323). And likewise, if one takes away my carriage, and has it painted anew without my authority, I am entitled to have the carriage without paying for the painting (*Hiscox v. Greenwood*, 4 *Esp.* 174).

(2) **Self-defence or defence of property.**—A trespass committed in self-defence, or defence of property, is justifiable. Thus, a dog chasing sheep or deer in a park, or rabbits in a warren, may be shot by the owner of the property in order to save them, but not otherwise (*Wells v. Head*, 4 *C. & P.* 568).

But a man cannot justify shooting a dog, on the ground that it was chasing animals *feræ naturæ* (*Vere v. Lord Caudor*, 11 *East*, 569), unless it was chasing game in a preserve, in which case it seems that it may be shot in order to preserve the game, but not after the game are out of danger (*Reade v. Edwards*, 34 *L. J., C. P.* 31).

(3) **In exercise of right.**—A trespass committed in exercise of a man's own rights, is justifiable. Thus, seizing goods of another, under a lawful distress for rent or damage feasant, is lawful.

(4) **Legal authority.**—Due process of law is a good

justification, as for example, an execution under a writ of *fiery facias*.

ART. 117.—*Possession necessary to Maintain an Action of Trespass.*

(1) To maintain an action merely for *trespass* or *conversion*, the plaintiff must be the person in actual or constructive possession of the goods (*Smith v. Miller*, T. R. 480).

(2) A legal right to possession gives constructive possession (*Balme v. Hutton*, 9 Bing. 447).

(3) Any possession however temporary is sufficient against a wrongdoer.

(4) Although he cannot maintain an action for mere trespass, the person entitled to the reversion of goods may maintain an action for any *permanent injury* done to them (*Tancred v. Allgood*, 28 L. J., Ex. 362; *Lancas. Waggon Co. v. Fitzhugh*, 30 L. J., Ex. 231; *Mears v. L. & S. W. R. Co.*, 11 C. B., N. S. 854).

(1) Where the person in temporary possession (as a carrier) delivers or sells my goods to the wrong person, then, as the immediate right to the possession of them becomes again vested in me, so the law immediately invests me with the possession, and I can maintain an action for them against either the bailee

or the purchaser (*Cooper v. Willomat*, 1 C. B. 672 ; *Wild v. Pickford*, 8 M. & W. 443).

(2) **Sale of property under lien.**—And so, when, by a sale of goods, the property in them has passed to the purchaser, subject to a mere lien for the price, the vendor will be liable for conversion if he resells and delivers them to another. But in such a case the plaintiff will only be entitled to recover the value of the goods, less the sum for which the defendant had a lien upon them (*Page v. Edulgee*, L. R., 1 C. P. 127 ; *Martindale v. Smith*, 1 Q. B. 389).

(3) And, on the same principle, an administrator may maintain an action for trespass to goods, which trespass was committed previously to his grant of letters of administration (*Thorpe v. Smallwood*, 5 M. & G. 760).

(4) So a trustee, having the legal property, may sue in respect of goods, although the actual possession may be in his cestui que trust (*Wooderman v. Baldock*, 8 Taunt. 676).

(5) In the leading case of *Armory v. Delamirie* (1 Sm. L. C. 315), it was held that the finder of a jewel could maintain an action against a jeweller to whom he had shown it, with the intention of selling it, and who had refused to return it to him ; for his possession gave him a good title against all the world except the true owner. (See also *Elliott v. Kempe*, 7 M. & W. 312.) In short, a defendant cannot set up a *jus tertii* against a person in actual possession. But where the possession of the plaintiff is not actual, but only constructive, the defendant may of course set up a *jus tertii* ; for constructive possession depends

upon a good title, and if the title be bad there can be no constructive possession (see *Leake v. Loreday*, 4 M. & G. 972; *Richards v. Jenkins*, 17 Q. B. D. 544).

ART. 118.—*Trespases by Joint Owners.*

A joint owner can only maintain trespass or conversion against his co-owner, when the latter has done some act inconsistent with the joint-ownership of the plaintiff (2 Wms. Saund. 470; and see *Jacobs v. Senard*, L. R., 5 H. L. 464).

(1) Thus, a complete destruction of the goods would be sufficient to sustain an action, for the plaintiff's interest must necessarily be injured thereby.

(2) But a mere sale of them by one joint owner would not, in general, be a conversion, for he could only sell his share in them. But if he sold them in market overt, so as to vest the whole property in the purchaser, it would be a conversion (*Mayhew v. Her-rick*, 7 C. B. 229).

ART. 119.—*Trespassers ab initio.*

If one, lawfully taking a chattel, but not absolutely, abuses or wastes it, he renders himself a trespasser *ab initio* (*Oxley v. Watts*, 1 T. R. 12).

Thus, if one find a chattel, it is no trespass to keep it as against all the world except the rightful owner.

But if one spoil or damage it, and the rightful owner eventually claim it, then the subsequent damage will revert back, and render the original taking unlawful (*Ibid.*). But, as against the true owner, a man commits no conversion by keeping the goods until he has made due inquiries as to the right of the owner to them (*Vaughan v. Watt*, 6 M. & W. 492; and see *Pillott v. Wilkinson*, 34 L. J., Ex. 22).

ART. 120.—*Remedy by Recaption.*

When any one has deprived another of his goods or chattels, the owner of the goods may lawfully reclaim and take them, wherever he happens to find them, so it be not in a riotous manner or attended with breach of the peace.

Remedies by action.—By the effect of the Judicature Acts, the distinction in form between actions has been finally abolished, so that the former actions of trespass (which lay for an interference with goods), trover (which lay for a wrongful conversion of goods), and detinue (which lay for a wrongful detainer of goods) no longer exist, although that of replevin is, at all events in its inception, still different from all other actions. It will, therefore, be convenient to consider the ordinary form of action first, and the action of replevin by itself afterwards.

ART. 121.—*Remedy by ordinary Action.*

Wherever there has been a trespass to, or wrongful conversion or wrongful detention of a chattel, an action lies at the suit of the person injured, for damages. And where the defendant still retains the chattel, the court, or a judge, has power to order that execution shall issue for return of the specific chattel detained, without giving the defendant the option of paying the assessed value instead; and if the chattel cannot be found, then, unless the court or judge shall otherwise order, the sheriff shall distrain the defendant by all his goods and chattels in his bailiwick till the defendant renders such chattel (Com. Law Proc. Act, 1854, s. 78).

ART. 122.—*Remedy by Action of Replevin.*

The owner of *goods distrained* is entitled to have them returned upon giving such security as the law requires, to prosecute his suit, without delay, against the distrainer, and to return the goods if a return should be awarded (see 19 & 20 Vict. c. 108, ss. 63—66).

The application for the replevying or return of the goods is made to the registrar of the county court of the district where the distress was made, who there-

upon causes their return on the plaintiff's giving sufficient security. The action must be commenced within one month in the county court, or within one week in one of the superior courts; but if the plaintiff intends to take the latter course, it is also made a condition of the replevin bond that the rent or damage, in respect of which the distress was made, exceeds 20*l.*, or else that he has good grounds for believing that the title to some corporeal or incorporeal hereditaments, or to some toll, market, fair, or franchise, is in dispute (19 & 20 Vict. c. 108, s. 95).

ART. 123.—*Waiver of Tort.*

When a conversion consists of a wrongful sale of goods, the owner of them may waive the tort, and sue the defendant for the price which he obtained for them, as money received by the defendant for the use of the plaintiff (*Lamine v. Dorrell*, 2 *L. Raym.* 1216; *Oughton v. Seppings*, 1 *B. & Ad.* 241; *Notley v. Buck*, 8 *B. & C.* 160). But, by waiving the tort, the plaintiff estops himself from recovering any damages for it (*Brewer v. Sparrow*, 7 *B. & C.* 310).

ART. 124.—*Recovery of Stolen Goods.*

If any person who has stolen property, or obtained it by false pretences, is prosecuted

to conviction by or on behalf of the owner, the property shall be restored to the owner, and the court before whom such person shall be tried shall have power to order restitution thereof (24 & 25 Vict. c. 96, s. 100).

Therefore, even if the goods were sold by the thief in market overt (which at common law gives an indefeasible title to the purchaser), yet, by this section, they must be given up to the original owner. And where no order is made under the act, yet the act revests the goods, and gives the owner a right of action for them (*Scattergood v. Silvester*, 19 L. J., Q. B. 447).

But, where an actual contract for the sale of goods is obtained by a false pretence, and the goods are delivered under the contract, and are subsequently sold by the offender to an innocent third party, the latter acquires a good title. For although the *contract* was obtained by a false pretence, yet the goods passed under it to the offender with the knowledge of the true owner, and the innocent purchaser will not be allowed to suffer (see *Moyce v. Newington*, 4 Q. B. D. 32, and *Badcock v. Lawson*, *ib.* 394).

ART. 125.—*Limitation.*

All actions for trespass to, or conversion, or detainer of goods and chattels, must be commenced within six years next after the cause of action arose.

Section V.

OF INFRINGEMENTS OF TRADE MARKS AND PATENT RIGHT AND COPYRIGHT.

ALTHOUGH the subject of trade marks, patent right, and copyright forms a separate group, practically standing apart from ordinary torts, and looked upon as a specialty to which a few practitioners wholly devote themselves, yet, strictly speaking, infringements of these rights are torts, and, as such, demand some notice (necessarily very elementary) to be taken of them, even in a small work like this.

SUB-SECT. 1.—INFRINGEMENT OF TRADE MARKS AND TRADE NAMES (a).

ART. 126.—*Definition.*

(1) A trade *mark* is the symbol by which a man causes his goods or wares to be identified and known in the market, and must now consist of one or more of the following essential particulars, namely :—

(a) The name of an individual or firm

(a) As to the distinction between trade marks and trade names, see *Victuallers', &c. Co. v. Bingham* (38 Ch. Div. 139).

printed, impressed, or woven in some particular and distinctive manner; or

(b) A written signature or copy of a written signature of an individual or firm, or a distinctive device, mark, brand, heading, label, ticket, or an invented word or words, but not a *single* letter (*Re Mitchell*, 7 Ch. Div. 36) nor a combination of letters (*Exp. Stephens*, 3 Ch. Div. 659); or a word or words having no reference to the character or quality of the goods, and not being a geographical name.

(c) A combination of any one or more of the above with any letters, words, or figures, or combination of letters, words, or figures; or

(d) Any special and distinctive word or words, or combination of figures or letters used as a trade mark previously to the 13th August, 1875 (51 & 52 Vict. c. 50, s. 10).

(2) A trade *name* is the name under which an individual or firm sell their goods, or a name, not merely descriptive, given by an individual to an article which, although previously known to exist, is new as an article of commerce, and which has become identi-

fied in the market with the goods sold by that individual, and not merely with the article itself.

Nature of the title to relief.—Whether the relief in the case of infringements of trade *mark* is founded upon a right of property in the mark, or on fraudulent misrepresentation, is by no means so clear as could be desired. It would seem that the tendency of the older cases was to hold that the jurisdiction was founded on fraud; but in the case of *The American Cloth Co. v. American Leather Cloth Co.* (33 *L. J.*, *Ch.* 199), Lord Westbury said, “The true principle seems to be that the jurisdiction of the court in the protection given to trade marks is founded upon property,” not of course property in the symbol itself, but in the sole application of the symbol to the particular class of goods of which it constituted the trade mark; and this view was followed in *Millington v. Fox* (3 *M. & C.* 338), and in *Harrison v. Taylor* (11 *Jur.*, *N. S.* 408.) On the other hand, in *The Singer Machine Manufacturers v. Wilson* (2 *Ch. D.* 434), the Master of the Rolls scouted the idea of there being any property in the trade mark, and founded the jurisdiction wholly upon deception. This view was supported by the Court of Appeal (2 *Ch. D.* 451), but upon the case being brought before the House of Lords (3 *App. Cas.* 376), Lord Cairns said, “That there have been many cases in which a trade mark has been used, not merely improperly, but fraudulently, and that this fraudulent use has often been adverted to and made the ground of the decision, I

do not doubt; but I wish to state in the most distinct manner that, in my opinion, fraud is not necessary to be averred or proved in order to obtain protection for a trade mark. . . . The action of the court must depend upon the right of the plaintiff and the injury done to that right. What the motive of the defendant may be, the court has very imperfect means of knowing. If he was ignorant of the plaintiff's rights in the first instance, he is, as soon as he becomes acquainted with them, and perseveres in infringing upon them, as culpable as if he had originally known them." Lord Blackburn, however, was more guarded in his language, and said, "I prefer to say no more, than that I am not as yet prepared to assent, either to the position that there is a right of property in a name, or, what seems to me nearly the same thing, to assent, to its full extent, to the proposition, that it is not necessary to prove fraud." It is, therefore, somewhat difficult to see upon what ground the court gives relief, but it is humbly suggested, that, as distinguished from an actual property in a trade mark, there is a negative property or right of preventing any other person from using it in such a manner as to cause a probability of such latter person's goods being mistaken for those of the person who has used the trade mark, but that such wrongful user, without fraud, is no ground for obtaining damages. Whether, however, this is the true reason or not, the following rule seems to be well established.

ART. 127.—*General Rule as to Infringement of Trade Marks and Names.*

(1) Where a person has a definite mark or name, he is entitled to an injunction to restrain any other person from using any mark or name so similar as either actually to have deceived, or such as obviously might deceive, the public, although there might be no intention to deceive (see per Lord Cairns in *Singer Machine Manufacturers v. Wilson*, *sup.*, and per Vice-Chancellor Wood in *Welch v. Knott*, 4 K. & J. 747). But he will not be liable to an action for damages, or (query) to render an account of his profits, unless he has acted fraudulently (see per Lord Blackburn in *Singer Manufacturers v. Wilson*, *sup.*).

(2) The question whether a name applied to a patented or other article constitutes a trade name, indicating the manufacturer, or has come to be regarded as the proper designation of the article itself, and therefore open to the whole world, is a question of evidence in each particular case (see per Lord Cairns, L. C., *Singer Machine Co. v. Wilson*, 3 App. Ca., at p. 385).

(1) Thus, in *Harrison v. Taylor* (*sup.*), the plaintiff had adopted, as his trade mark, the figure of an ox, on the flank of which was printed the word

"Durham," the names of the plaintiff being printed above the word "Durham," and the word "mustard" below. The defendants, who were also mustard manufacturers, used a similar ox, but without the words "Durham" and "mustard," but having the name Taylor printed below. The fact of the plaintiff's mark being well known throughout the trade having been proved, the Court held, that the defendant's mark was so similar as to be likely to deceive intending purchasers; and, although the defendant did not know that he had infringed the plaintiff's mark, an injunction was granted to restrain him from further using it.

(2) So, in *Cocks v. Chandler* (*L. R.*, 11 *Eq.* 446), where the inventor of a sauce sold it in wrappers, whereon it was called "The Original Reading Sauce," and the defendant brought out a sauce which he labelled "Chandler's Original Reading Sauce," he was restrained from doing so for the future (and see *Braham v. Beachin*, 7 *Ch. Div.* 848; and *Boulnois v. Peate*, 13 *Ch. Div.* 513, *n.*).

(3) So, where A. introduces into the market an article which, though previously known to exist, is new as an article of commerce, and has acquired a reputation in the market by a name, *not merely descriptive* of the article, B. will not be permitted to sell a similar article under the same name (*Braham v. Bustard*, 1 *H. & M.* 449). But where the inventor of a new substance, or a new machine, has given it a name, and having taken out a patent for his invention, has, during the continuance of the patent, alone made and sold the substance or machine by that

name, he is nevertheless not entitled to the exclusive use of that name after the expiration of the patent, for the name has in such a case become merely the name of the article, and not the badge of the maker of it (*Linoleum Co. v. Nairn*, 7 Ch. Div. 834; *Chearin v. Walker*, 5 Ch. Div. 850; and see *Singer Manufacturing Co. v. Loog*, 8 App. Ca. 14).

(4) In *McAndrew v. Bassett* (33 L. J., Ch. 561), the plaintiffs had manufactured liquorice which they stamped with the word "Anatolia;" and it was held, that, though this was but the name of a place, yet a property in it could be acquired when it had been notoriously applied to a vendible commodity sold only by a particular firm (and see also *Seigert v. Findlater*, 7 Ch. Div. 801; *Victuallers' &c. Co. v. Bingham*, 38 Ch. Div. 139).

(5) And so where the omnibuses of an omnibus proprietor were marked with particular figures and devices, an injunction was granted to restrain an opposition omnibus proprietor from adopting similar figures and devices (*Knott v. Morgan*, 2 Keen, 219).

ART. 128.—*Rights of Assignee of Trade Mark.*

(1) Although a trader may have a property in a trade mark, sufficient to give him a right to exclude all others from using it, yet if his goods derive their increased value from the personal skill or ability of the adopter of the trade mark, he will not be allowed to

assign it; for that would be a fraud upon the public (*Leather Cloth Co. v. American Leather Cloth Co.*, 1 H. & M. 271).

(2) But if the increased value of the goods is not dependent upon such personal merits, the trade mark is assignable (*Bury v. Bedford*, 33 L. J., Ch. 465) along with the goodwill of the business to which it belongs, but not apart from that goodwill (46 & 47 Vict. c. 57, s. 70).

ART. 129.—*Selling Articles under Vendor's own Name.*

Where a person sells an article with his own name attached, and another person of the same name sells a like article with his name attached, an injunction will not be granted to prevent such last-named person from doing so, unless it appears to the court that he does it with the fraudulent intention of palming his goods upon the public as being those of the plaintiff (*Burgess v. Burgess*, 22 L. J., Ch. 675; *Sykes v. Sykes*, 3 B. & C. 541; *Massam v. Thorley's Food Co.*, 14 Ch. Div. 748).

But if a fraudulent intention is proved, or appears by necessary implication, an injunction will be granted. For instance, where two persons, one

named Day and the other Martin, set up a blacking shop, and advertised their goods as "Day and Martin's," Mr. Justice Chitty granted an injunction, on the ground that it was a plain attempt to hood-wink the public into the belief that they were selling the blacking of the well-known manufacturers of blacking. (See also *Acc. Ins. Co. v. Acc., Disease, & Gen. Ins. Co.*, 54 L. J., Ch. 184.)

ART. 130.—*Registration of Trade Marks.*

No person can institute a suit to prevent the infringement of any trade *mark*, until and unless such mark is registered in the register of trade marks. Registration is *primâ facie* evidence of the right to the trade mark, and after five years is conclusive evidence (46 & 47 Vict. c. 57, ss. 76, 77). But this rule does not apply to actions for preventing the infringement of a trade *name*.

SUB-SECT. 2.—INFRINGEMENT OF PATENT RIGHT.

ART. 131.—*Definition of Patent Right.*

A patent right is a privilege granted by the Crown (by letters patent) to the first inventor of any new manufacture or inven-

tion, that he and his licensees shall have the sole right, during the term of fourteen years, of making and vending such manufacture or invention.

It is, however, not intended in this work to give any account of the mode of getting a grant of letters patent. The following summary of the law is based, in fact, on the assumption that letters patent have been granted.

ART. 132.—*Factors necessary to a Valid Patent.*

Letters patent are void and of no effect if one or more of the five following conditions are absent, viz. :—

- (1) The subject of the patent must be a manufacture ;
- (2) It must be a new invention ;
- (3) The patentee or one of the patentees (where there are more than one) must be the true and first inventor ;
- (4) The subject of the patent must be of general public utility ;
- (5) A complete specification (*i.e.*, a sufficient description of the nature of the invention and the mode of carrying it into effect, so as to enable ordinarily skilful persons to practise and use it at the end of the term for which the

patent is granted) must be filed within nine months from the date of the application for the patent (see 21 Jac. 1, c. 3; 15 & 16 Vict. c. 83, s. 27; 46 & 47 Vict. c. 57, ss. 5 *et seq.*).

ART. 133.—*What is a Manufacture.*

The word manufacture denotes either (a) a thing made which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope, and many others; or (b) an engine or instrument, or some part of an engine or instrument, to be employed either in the making of some previously known article, or some other useful purpose; or (c) a new process to be carried on by known implements, or elements, acting upon known substances, and ultimately producing some other known substances, but in a cheaper or more expeditious manner, or of a better and more useful kind (Abbott, C. J., *R. v. Wheeler*, 2 B. & Al. 349; *Crane v. Price*, 4 M. & G. 580).

Thus, a patent for the omission merely of one or more of several parts of a process, whereby the process may be more cheaply and expeditiously performed, is valid (*Russell v. Cowley*, 1 Webst. R. 464);

or for an *improvement* in one or more of several parts of a whole (*Clarke v. Adie*, 2 *App. Ca.* 315).

ART. 134.—*Newness of Manufacture.*

The prior knowledge of an invention to avoid a patent must be such knowledge as will enable the British public to perceive the very discovery and to carry the invention into practical use (*Hill v. Evans*, 4 *D., F. & J.* 288). If there be great utility proved, novelty will be presumed, until disproved (*Crane v. Price*, 1 *Webs. Pat. Cas.* 393; *Young v. Fernie*, 4 *Giff.* 577).

(1) Thus, a new combination of purely old elements is a novel invention, because the public could not have perceived the combination from the separate parts (*Harrison v. Anderston Co.*, 1 *App. Ca.* 574).

(2) On the other hand, the mere application of a known instrument to purposes so analogous to those to which it has been previously applied as to at once suggest the application, is no ground for a patent (*Harwood v. G. N. R. Co.*, 2 *B. & S.* 194, and 11 *H. L. C.* 654). So, where there was a known invention for dressing cotton and linen yarns by machinery, and a subsequent patent was procured for finishing yarns of wool and hair, the process being the same as in the first invention for cotton and linen, the patent was held void (*Brook v. Aston*, 32 *L. J. Ch.* 341, and *Patent Bottle Co. v. Seymour*, 5 *C. B., N. S.*

164; but compare *Dangerfield v. Jones*, 13 L. T., N. S. 142, and *Young v. Fernie*, 4 Giff. 577).

(3) Again, where crinolines were made of whalebone suspended by tapes, and an inventor claimed a patent for crinolines of exactly similar construction, with the single substitution of steel watch-springs for whalebone, it was held that there was not sufficient novelty (and see *Thorn v. Worthing Co.*, 6 Ch. Dir. 415 n.).

(4) If the article be new in this realm, but not new elsewhere, it is yet the subject for a valid patent; for the object of letters patent is to give a species of premium for improving the manufactures, not so much of the world, as of the United Kingdom (*Beard v. Eggerton*, 3 C. B. 97).

ART. 135.—*Meaning of true and first Inventor.*

If the invention has been communicated to the patentee by a person in this country, he cannot claim to be the true and first inventor; but if he has acquired the knowledge of the invention abroad, and introduces it here, the law looks upon him as the true and first inventor (*Lewis v. Marling*, 10 B. & C. 22; *Marsden v. Saville St. Co.*, 3 Ex. D. 203).

And so if the invention has been discovered before, but kept secret by the inventor, it does not render the patent of a subsequent inventor of it invalid; for it is

new so far as the public are concerned (*Carpenter v. Smith*, 1 *Webst. R.* 534, per Lord Abinger).

ART. 136.—*General Public Utility.*

The community at large must receive some benefit from the invention.

The reason of this condition is obvious, for an useless invention not only does not merit the premium of a monopoly, but, what is worse, prevents other inventors from improving upon it.

Thus, if one produces old articles in a new manner, such new way must, in some way, be superior to the old method, in order to support a patent; for otherwise the old method is as good as the new; but the Court construes such an invention very strictly, as it looks jealously at the claims of inventors seeking to limit the rights of the public in effecting a well-known object (*Curtis v. Platt*, 3 *Ch. D.* 135, *n.*).

And if the article is produced at a cheaper rate by the new machine, or in a superior style, it is a good ground for a patent.

ART. 137.—*Specification.*

(1) If the specification (as the description is called) be ambiguous, insufficient, or misleading, it will render the patent void (*Simpson v. Holliday*, *L. R.*, 1 *H. L.* 315; *Savory v. Price*, *Ry. & Mo.* 1; and *Hinks v. Safety*

Lighting Co., 4 Ch. Div. 607), unless the ambiguity, variation, or imperfection be slight and immaterial (*Gibbs v. Cole*, 3 P. Wms. 255). A patentee may, however, from time to time, obtain leave to amend his specification, so long as such amendment does not make the invention substantially larger than, or substantially different from, the invention as originally specified. Such leave, however, cannot be obtained after the commencement of any legal proceeding in relation to the patent (46 & 47 Vict. c. 57, s. 18).

(2) If an objection be sustained against any one or more of several inventions included in the same patent, the entire patent is void. Provided that a patentee may obtain leave from the Patent Office, before the commencement of any legal proceeding, to disclaim any invention or part of an invention included in the specification; and may, even after the commencement of any legal proceeding, obtain leave to make such disclaimer from the court or the judge before which or whom such proceeding may be pending, subject to such terms as such court or judge may impose as to costs or otherwise (46 & 47 Vict. c. 57, ss. 18, 19).

ART. 138.—*What constitutes Infringement.*

A person infringes a patent right by using, exercising, or vending the invention within this realm.

(1) Thus, the captain of a vessel, fitted with pumps, which were an infringement of the plaintiff's patent, was held liable, although he was not owner of the vessel (*Adair v. Young*, 12 *Ch. Div.* 13).

(2) So, where a patent had been granted in England for a new process for producing more cheaply a product previously known, the importation of that product made abroad by the patented process was held to be an infringement (*Van Heyden v. Neustadt*, 14 *Ch. Div.* 203).

Exceptions.—1. It would seem that when articles, which are the subject of a patent, are made without a licence from the patentee, simply for the purpose of bonâ fide experiments, those who make them are not liable, unless they are made and used for profit, or with the object of obtaining profit, however limited (*Frearson v. Loe*, 9 *Ch. Div.* 48).

2. Where a specification has been amended by disclaimer or otherwise, no damages will be given in any action for infringement committed before the amendment was made, unless the patentee establishes to the satisfaction of the court that his original claim was framed in good faith and with reasonable skill (46 & 47 *Vict. c.* 57, s. 20).

Such is a very slight sketch of the elements of the law relating to patents. Let us now pass on to the law of copyright.

SUB-SECT. 3.—OF INFRINGEMENTS OF COPYRIGHT.

ART. 139.—*Definition and Extent of Copyright.*

(1) Copyright is the exclusive right which an author possesses of multiplying copies of his own work.

(2) The copyright in a book published in the author's lifetime belongs to the author and his assigns during the life of the author, and seven years after his death. If, however, that period expires before the end of forty-two years from the first publication of such book, the copyright in that case endures for such period of forty-two years (5 & 6 Vict. c. 45, s. 3).

(3) The copyright in a work published subsequently to the author's death, belongs to the proprietor of the manuscript for the term of forty-two years from the first publication (*Ibid.*).

(4) The proprietor of a copyright cannot sue or proceed for any infringement of his copyright before making an entry of it at Stationers' Hall (*Ibid.* sect. 11).

Exception. Immoral works.—There is no copyright in libellous, fraudulent, or immoral works (*Stockdale v. Onychyn*, 5 B. & C. 173; *Southey v. Sherwood*, 2 Mer. 435).

Thus, where a work professes to be the work of a person other than the real author, with the object thereby to induce the public to pay a higher price for it, no copyright can be claimed in it (*Wright v. Tallis*, 1 C. B. 893).

ART. 140.—*Meaning of Book.*

The word book includes every volume, part and division of a volume, pamphlet, sheet of letter-press, sheet of music, chart, map, or plan separately published (sect. 2, and see *Henderson v. Maxwell*, 5 Ch. Div. 892).

(1) Thus, there may be copyright in the wood engravings of a work, for they are part of the volume (*Bogue v. Houlston*, 5 De G. & Sm. 267).

(2) An illustrated catalogue of articles of furniture published as an advertisement by upholsterers, and not for sale, may be the subject of copyright (*Maple & Co. v. Junior Army & Navy Stores*, 21 Ch. D. 369). So may a telegraphic code (*Ager v. P. & O. Co.*, 26 Ch. Div. 637).

(3) So also copyright may subsist in part of a work, although the rest may not be entitled to it (*Low v. Wood*, L. R., 6 Eq. 415).

(4) Again, a newspaper is within the Copyright Act, and requires registration in order to give the proprietor copyright in its contents; and, in order that the proprietor of the paper may become the proprietor of the copyright in an article, he must show

that he paid the writer for the copyright (*Walter v. Hoice*, 17 *Ch. D.* 708).

(5) But it seems that copyright is not claimable in a single word, as the title of a magazine; "Belgravia," for instance (*Maxwell v. Hogg*, *L. R.*, 2 *Ch.* 207); nor, as a general rule, in the title of a book (*Dicks v. Yates*, 18 *Ch. D.* 76; *Schore v. Schmincke*, 34 *W. R.* 700). It seems, however, clear that the publication of a magazine or book under the title of another existing one might be a common law fraud.

(6) Directions on a barometer face have been held not to be a book (*Davis v. Comitti*, 54 *L. J.*, *Ch.* 419).

ART. 141.—*What constitutes Infringement of Copyright.*

(1) Copyright is infringed by publishing in this kingdom an unauthorized edition of a work in which copyright exists, or by introducing here a foreign reprint of such a work, or while pretending to publish an original work, illegitimately appropriating the fruits of another author's labour (see per James, *L. J.*, *Dicks v. Yates*, 18 *Ch. Div.* 90).

(2) In the last case the Act that secures copyright to authors, guards against the piracy of the words and sentiments, but does not prohibit writing on the same subject

(per Mansfield, C. J., *Sayre v. Moore*, 1 *East*, 359).

(1) **Unauthorized publications.**—Thus, any person causing a book to be printed for sale or exportation, without the written consent of the proprietor of the copyright; or who imports for sale such unlawfully printed book; or with a guilty knowledge sells, publishes, or exposes for sale or hire, or has in his possession for sale or hire, any such book without the consent of the proprietor, is liable to an action at the suit of the proprietor, to be brought within twelve calendar months. And an injunction may be also obtained, to restrain the further infringement.

(2) An injunction may even be granted to restrain a person from printing the unpublished works of another (*Prince Albert v. Strange*, 1 *Mac. & Gor.* 25). And an action at law may also be maintained for the same cause (*Mayall v. Higby*, 6 *L. T.*, *N. S.* 362).

(3) So, an injunction will also be granted, if a person, under colour of writing a review, copies out so large and important a portion of the work as to interfere with the sale of it: but a reasonable amount of quotation, in order to review the work properly, is allowable (*Campbell v. Scott*, 11 *Sim.* 31; *Bell v. Walker*, 1 *Bro. Ch. C.* 450).

(4) **Unauthorized importations of foreign reprints.**—Besides the remedy by action and injunction, there is also a quasi-criminal remedy in the case of *imported* piracies, by means of penalties. These do not take away the remedy by action, but are cumulative (sect. 17).

(5) **Passing off another's work as one's own.**—Where the infringement consists, not of a reprint, but of what may be called literary petty larceny—the stealing of another man's labour, and the palming of it off as one's own—"there must be such a similitude as to make it probable and reasonable to suppose that one is a transcript, and nothing more than a transcript. In the case of prints, no doubt different men may take engravings from the same picture. The same principle holds with regard to charts. Whoever has it in his intention to publish a chart, may take advantage of all prior publications. There is no monopoly here, any more than in other instances; but upon any question of this kind, the jury will decide whether it be a servile imitation or not. If an erroneous chart be made, God forbid it should not be corrected, even in a small degree, so that it thereby becomes more serviceable and useful" (per Mansfield, C. J., *Sayre v. Moore*, *sup.*).

(6) And even where a great part of the plaintiff's work has been taken into the defendant's it is no infringement, so long as the defendant has so carefully revised and corrected it, as to produce an original result (*Spiers v. Browne*, 6 *W. R.* 352, and consider *Dicks v. Brooks*, 15 *Ch. Div.* 22); or, if it was fairly done with a view of compiling a useful book for the benefit of the public, upon which there has been a totally new arrangement of such matter (per Ellenborough, C. J., *Cary v. Kearsley*, 4 *Esp.* 170). And the part taken by the defendant must be substantial and material to enable the plaintiff to sustain an action (*Chatterton v. Carr*, 3 *App. Ca.* 483).

(7) **What is piracy of music.**—With respect to music, if the whole air be taken it is a piracy, although set to a different accompaniment, or even with variations; for the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same substantially; the piracy is, where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear (*D'Almaine v. Boosey*, 1 Y. & C., Ex. 288, per Lyndhurst). But, on the other hand, where one composed and published an opera in full score, and after his death B. arranged the whole opera for the piano, it was held that this was an independent musical composition and no piracy (*Wood v. Boosey*, L. R., 3 Q. B. (Ex. Ch.) 223).

(8) **Plays founded on novels.**—To produce the incidents of a novel in the form of a play, is theoretically no infringement of copyright (see *Reade v. Conquest*, 30 L. J., C. P. 209; *Tinsley v. Lacy*, 32 L. J., Ch. 535; *Reade v. Lacy*, 30 L. J., Ch. 655). But practically it is where the play would, if published as a book, be an infringement. For before a play can be acted a copy of it must be sent to the Lord Chamberlain and other copies must be issued for the use of the actors, and these copies constitute "books" within the Law of Copyright. Thus in the recent case of *Warne v. Seeborn* (39 Ch. Div. 73), the defendant had dramatized the novel "Little Lord Fauntleroy," and caused his play to be per-

formed. The infringement of copyright complained of was that, for the purpose of producing the play, the defendant made four copies, one for the Lord Chamberlain and three for the use of the performers.

Very considerable passages in the play were extracted almost verbatim from the novel. Held, that the plaintiffs were entitled to an injunction restraining the defendant from multiplying copies of the play containing passages from the defendant's book; and also that all such passages in the four existing copies must be cancelled.

Other copyrights.—Besides the copyright in literary works, there is also a copyright in various other productions; but in a work like the present, space will not permit me to do anything more than sketch out the main heads of the rights of individuals in respect of these productions.

Oral lectures.—The publication of oral lectures, except those delivered in colleges, &c., is prohibited by 5 & 6 Will. 4, c. 65, without the author's consent; but in order to have the benefit of this act, the lecturer must give previous notice to two justices of the peace (see *Nicols v. Pitman*, 26 Ch. Div. 374).

Right of representation of dramatic and musical works.—The right of publicly *representing* dramatic and musical compositions, *first produced in this realm* (*Boucicault v. Chatterton*, 5 Ch. Div. 267), is vested in the author or composer, and he assigns, for the same period as in literary compositions, by 5 & 6 Vict. c. 45, s. 20, which also imposes penalties upon any person performing them without the written leave of the author or composer. These penalties

are not cumulative, but only alternative. As to what is a public representation see *Wall v. Taylor* (11 Q. B. D. 102), and *Duck v. Bates* (13 Q. B. D. 843).

Assignment of copyright does not include right of representation.—I may mention, that the assignment of the copyright of a book containing dramatic or musical compositions is only an assignment of the right of multiplying copies of it, and not of the right of representing it (sect. 22), unless at the time of registering the assignment the same is expressly stated. But a mere assignment of the right of representation does not seem to require registration (*Lacy v. Rhys*, 22 L. J., Q. B. 157). Similarly, the publication, in this country, of a dramatic piece, or musical composition, as a book, before it has been publicly represented or performed, does not deprive the author or his assignee of the exclusive right of performing or representing it (*Chappell v. Boosey*, 2 Ch. D. 232).

Engravings.—Engravings are protected by the statutes 8 Geo. 2, c. 13; 7 Geo. 3, c. 38; and 17 Geo. 3, c. 57.

Sculpture.—Sculptures and models by 38 Geo. 3, c. 71, and 54 Geo. 3, c. 56.

Designs.—Useful and ornamental designs are protected by “The Patents, Designs, and Trade Marks Act, 1883.”

Works of art.—Paintings, drawings, and photographs by 25 & 26 Vict. c. 68. (As to the latter see *Nottage v. Jackson*, 11 Q. B. D. 627.)

Conclusion.—Here this summary statement of the law relating to torts must end. The student must not, however, imagine that such injuries as are not named in this or any other treatise are therefore not remediable by the law, for wrongs are infinitely various. Let him in such cases recollect the observation of Cicero, “*Erat enim ratio profecta a rerum naturâ, et ad recte faciendum impellens, et a delicto avocans: quæ non tum denique incipit lex esse cum scripta est, sed tum, cum orta est.*”

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